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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM 1992

GARY T. DIXON, Warden, Central Prison, Raleigh, North Carolina, and LACY H. THORNBURG, Attorney General of the State of North Carolina,
Petitioners,

v.

DOUGLAS WILLIAMS, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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92

QUESTIONS PRESENTED

I. **WHETHER THE NEW RULE OF *MILLS V. MARYLAND*, 486 U.S. 367 (1988) AND *MCKOY V. NORTH CAROLINA*, 494 U.S. 433 (1990) APPLIES RETROACTIVELY TO ALREADY FINAL CONVICTIONS AND DEATH SENTENCES UNDER THE SECOND EXCEPTION OF *TEAGUE v. LANE*, 489 U.S. 288 (1989) FOR "BEDROCK PROCEDURAL ELEMENTS" WHICH ARE "IMPLICIT IN ORDERED LIBERTY?"**

II. **WHETHER *TEAGUE* IS AN AFFIRMATIVE DEFENSE WHICH MUST BE RAISED BY THE STATE IN THE DISTRICT COURT OR ELSE IS WAIVED?**

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL AMENDMENTS AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS WHY THE WRIT SHOULD ISSUE 8

I. THE FOURTH CIRCUIT'S EXTRAORDINARY HOLDING THAT *MILLS* AND *MCKOY* MAY BE APPLIED RETROACTIVELY UNDER *TEAGUE*'S SECOND EXCEPTION CONFLICTS WITH THIS COURT'S OWN EIGHTH AMENDMEN JURISPRUDENCE, AS WELL AS WITH OTHER CIRCUIT COURTS, AND THEREFORE CERTIORARI REVIEW IS NECESSARY TO RESOLVE THIS IMPORTANT ISSUE OF CONSTITUTIONAL LAW. 9

II. THE FOURTH CIRCUIT'S DECISION ON NON-RETROACTIVITY AS AN AFFIRMATIVE DEFENSE ADOPTS A POSITION WHICH IS IN CONFLICT WITH THE MAJORITY OF THE OTHER CIRCUITS ON THIS ISSUE, AND RAISES AN IMPORTANT ISSUE WARRANTING REVIEW ON CERTIORARI 16

CONCLUSION 22

APPENDIX

TABLE OF AUTHORITIES

Boardman v. Estelle, 957 F.2d 1523 (9th Cir. 1992), *cert. pending*, _ U.S. _, No. 91-2006 (petition filed June 8, 1992) 19

Butler v. McKellar, 494 U.S. 407 (1990) 21

Caldwell v. Mississippi, 472 U.S. 320 (1985) 10

Card v. Dugger, 911 F.2d 1494 (11th Cir. 1990) 19

Collins v. Youngblood, 497 U.S. 37, 110 S.Ct. 2715 (1990) 17

Commonwealth v. Frey, 520 Pa. 338, 5 54 A.2d 27 (1989), *cert. denied*, ____U.S. ___, 110 S.Ct. 1500 (1990) 15

Cordova v. Collins, 953 F.2d 167 (5th Cir. 1992) 13

Couch v. Jabe, 951 F.2d 94 (6th Cir. 1991) 18

Cruz v. New York, 481 U.S. 186 (1987) 20

Dugger v. Adams, 489 U.S. 401 (1989) 12

Eddings v. Oklahoma, 455 U.S. 104 (1982) 21

Ex parte Martin, 548 So.2d 496 (Ala. Cr. App. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 419 (1989) 15

Gardner v. Dixon, No. C-88-179-WS (M.D.N.C., Sept. 11, 1991), *aff'd*, _ F.2d __, No. 91-4010 (4th Cir., June 4, 1992) 13

Gideon v. Wainwright, 372 U.S. 335 (1963) 10

Granberry v. Greer, 481 U.S. 129 (1987) 19

Gregg v. Georgia, 428 U.S. 153 (1976) 12

Hanrahan v. Greer, 896 F.2d 241 (7th Cir. 1990), *later appeal sub nom., Hanrahan v. Thieret*, 933 F2d 1328 (7th Cir.), *cert. denied*, _ U.S. _, 112 S. Ct. 446 (1991) 9, 18, 20

Hill v. McMackin, 893 F.2d 810 (6th Cir. 1989) 18

Hopkinson v. Shillinger, 888 F.2d 1286 (10th Cir. 1989) (*en banc*), *cert. denied*, ___ U.S. ___, 110 S.Ct. 3256 (1990) 18, 20, 21

House v. Tennessee, ___ U.S. ___, 111 S.Ct. 284 (1990) 15

James v. Whitley, 926 F.2d 1433 (5th Cir. 1991) 15

Kordenbrock v. Scroggy, 919 F.2d 1091 (6th Cir. 1990) (*en banc*), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1608 (1991) 15, 18

Kubat v. Thieret, 867 F.2d 351 (7th Cir.), *cert. denied sub nom., Kubat v. Greer*, _ U.S. _, 110 S. Ct. 206 (1989) 16

Lawson v. Dixon, No. C-88-738-S (M.D.N.C., Jan. 7, 1992), *appeal pending*, No. 92-4003, 4004 (4th Cir.) 13

Lockett v. Ohio, 438 U.S. 586 (1978) 5

Maynard v. Dixon, 943 F.2d 407 (4th Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S.Ct. 1211 (1992) 19

McDougall v. Dixon, 921 F.2d 518 (4th Cir. 1990), *cert. denied* _ U.S. _, 111 S. Ct. 2840 (1991) 13

McKoy v. North Carolina, 494 U.S. 433 (1990) 6, 8, 11, 12

Mills v. Maryland, 486 U.S. 367 (1988) 6

Moore v. Zant, 885 F.2d 1497 (11th Cir. 1989) (*en banc*), *cert. denied*, ____ U.S. ____, 110 S.Ct. 3255 (1990) 19, 21

Penry v. Lynaugh, 492 U.S. 302 (1989) 9, 16, 18

People v. Davis, 794 P.2d 159 (Colo. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 770 (1991) 15

People v. Rodriguez, 794 P.2d 965 (Colo. 1990) 15

Rodriquez v. Colorado, _ U.S. _,
111 S. Ct. 770 (1991) 15

Saffle v. Parks, 494 U.S. 484 (1990) 11, 13, 17, 21

Sawyer v. Smith, 497 U.S. 27,
110 S. Ct. 2822 (1990) 10, 11, 17

Smith v. Black, 904 F.2d 950 (5th Cir.
1990), *cert. granted and judgment
vacated on other grounds*, _ U.S. _,
112 S. Ct. 1463 (1992) 18

Smith v. Dixon, 766 F.2d 1370 (E.D.
N.C. 1991), *appeal pending*, Nos. 91-4011
-4012 (4th Cir.) 13

State v. Anthony and Craig, 308 N.C. 446,
302 S.E.2d 740, *cert. denied*, 464 U.S. 908 (1983) 14

State v. Boyd, 311 NC. 408, 319 S.E.2d 189
(1984), *cert. denied*, 471 U.S. 1030 (1985) 14

State v. Brown, 306 N.C. 151, 293 S.E.2d 569
(1982), *cert. denied*, 459 U.S. 1080 (1982) 14

State v. (Thomas Jack) Brown, 320 N.C. 179,
358 S.E.2d 1, *cert. denied*, 484 U.S. 970 (1987) 14

State v. (Willie) Brown, 315 N.C. 40,
337 S.E.2d 808 (1985), *cert. denied*,
476 U.S. 1165 (1986) 14

State v. Clark, 108 N.M. 288, 772 P.2d. 322 (1989) 15

State v. Gardner, 311 N.C. 489, 319 S.E.2d
591 (1984), *cert. denied*, 469 U.S. 1230
(1985), *denial of habeas relief affirmed
in, sub nom., Gardner v. Dixon*, ___ F.2d ___,
No. 91-4010 (4th Cir., June 4, 1992) (petition
for reh'g pending, filed June 18, 1992) 14

State v. Green, ___ S.C. ___, 392 S.E.2d
157 (1990), *cert. denied*, ___ U.S. ___,
111 S.Ct. 229, *reh. denied*, ___ U.S. ___,
111 S.Ct. 548 (1990) 15

State v. Henderson, 109 N.M. 655,
789 P.2d 603 (1990) 15

State v. Huffstetler, 312 N.C. 92,
322 S.E.2d 110 (1984), *cert. denied*,
471 U.S. 1009 (1985) 14

State v. Kirkley, 308 N.C. 196,
302 S.Ed.2d 144 (1983) 5, 6, 8

State v. Lawson, 310 N.C. 632,
314 S.E.2d 493 (1984), *cert. denied*,
471 U.S. 1120 (1985), *habeas relief*
denied in, sub nom., Lawson v. Dixon,
No. C-88-738-S (M.D.N.C., Jan. 7, 1992),
appeal pending, ___ F.2d ___, Nos. 92-4003,
-4004 (4th Cir.) 14

State v. McKoy, 323 N.C. 1, 372 S.E.2d
12 (1988), *rev'd and remanded sub nom.*,
McKoy v. North Carolina, 494 U.S. 433 (1990) 20

State v. McKoy, 327 N.C. 31, 394 S.Ed.2d
426 (1990) 7

State v. McNeil, 327 N.C. 388, 395 S.Ed.
106 (1990), *cert denied*, _ U.S. _
111 S. Ct. 1403 (1991) 7

State v. Noland, 312 N.C. 1, 320 S.E.2d
642 (1984), *cert. denied*, 469 U.S. 1230,
reh'g denied, 471 U.S. 1050 (1985) 14

State v. Oliver, 302 N.C. 28, 274 S.E.2d
183 (1981), *appeal following remand*,
309 N.C. 326, 307 S.E.2d 304 (1983) 15

State v. Patterson, 299 S.C. 280,
384 S.E.2d 699 (1989), *cert. granted,*
judgment vacated, and remanded
for further consideration on other
grounds, ___ U.S. ___, 110 S.Ct. 709
(1990), *reaffirmed in*, ___ S.C. ___,
396 S.E.2d 366 (1990) 15

State v. Petary, 790 S.W.2d 243 (Mo. banc 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 443 (1990) 15

State v. Pinch, 306 N.C. 1, 292 S.E.2d 203 (1982), *cert. denied*, 459 U.S. 1056, *reh'g denied*, 459 U.S. 1189 (1982) 14

State v. Robbins, 319 N.C. 465, 356 S.E.2d 279, *cert. denied*, 484 U.S. 918 (1987) 14

State v. Smith, 305 N.C. 691, 292 S.E.2d 264 (1982), *cert. denied*, 459 U.S. 1056 (1982), *habeas relief granted on other grounds sub nom., Smith v. Dixon*, 766 F.Supp. 1370 (E.D.N.C. 1991), *appeal pending*, ___ F.2d ___, Nos. 91-4011, -4012 (4th Cir.) 14

State v. Taylor, 304 N.C. 249, 283 S.E.2d 761 (1981), *cert. denied*, 463 U.S. 1213, *reh'g denied*, 463 U.S. 1249 (1983) 15

State v. Williams, _ N.C. _, 358 S.E.2d 68 (1987) 5

State v. Williams, 305 N.C. 656, 292 S.E.2d 243 (1982), *cert. denied*, 459 U.S. 1056, *reh'g denied*, 459 U.S. 1189 (1982) 15

State v. Williams, 308 N.C. 47, 301 S.E.2d 335, *cert. denied*, 464 U.S. 865, *reh'g denied*, 464 U.S. 1004 (1983) 3, 5

State v. Williams, _ N.C. _, 397 S.E.2d 237 (1990) 7

State v. Zuniga, 320 N.C. 233, 357 S.E.2d 898, *cert. denied*, 484 U.S. 959 (1987) 14

Teague v. Lane, 489 U.S. 288 (1989) 6, 9, 10, 12, 17

Thomas v. Jones, 742 F.Supp. 598 (S.D. Ala. 1990), ***aff'd***, _ F.2d _ (11th Cir., July 11, 1990) (unpublished), ***cert. and stay denied***, _ U.S. _, 111 S. Ct. 1 (1990) 13

Williams v. Dixon,_ F.2d _, No. 89-4001 (4th Cir., Mar. 13, 1992), ***reh'g denied***, _ F.2d _, No. 89-4001 (4th Cir., Apr. 17, 1992) 1

Williams v. North Carolina, 464 U.S. 865, ***reh'g denied***, 464 U.S. 1004 (1983) 5

Woodson v. North Carolina, 428 U.S. 280 (1976) 12

Ylst v. Nunnemaker, ___ U.S. ___, 111 S.Ct. 2590 (1991) 18

Zant v. Moore, 489 U.S. 836 (1989) 18

Zettlemoyer v. Fulcomer, 923 F.2d 284 (3rd Cir.), ***cert. denied***, _ U.S. _, 112 S. Ct. 280 (1991) 14

CONSTITUTION

U.S. Const. Amend. VIII 2
U.S. Const. Amend. XIV, §1 2
Article IV, §12, North Carolina Constitution 6, 7

STATUTES

N.C. Gen. Stat. § 7A-32(b) (1981) 5
N.C. Gen. Stat. § 15A-1415 (Cum. Supp. 1981) 5
N.C. Gen. Stat. § 15A-1422(c)(3) (1978) 5
N.C. Gen. Stat. § 15A-2000 (Cum. Supp. 1981) 3
N.C. Gen. Stat. § 15A-2000(b) (Cum. Supp. 1981) 2
N.C. Gen. Stat. § 15A-2000(e)(5) 3,4
N.C. Gen. Stat. § 15A-2000(e)(6) 4
N.C. Gen. Stat. § 15A-2000(e)(9) 4
N.C. Gen. Stat. § 15A-2000(f)(1) 4
N.C. Gen. Stat. § 15A-2000(f)(2) 4
N.C. Gen. Stat. § 15A-2000(f)(6) 4

N.C. Gen. Stat. § 15A-2000(f)(7) 4
N.C. Gen. Stat. § 15A-2000(f)(9) 4

28 U.S.C. § 1254(1) 2
28 U.S.C. § 2254 5

RULES

Rule 10.1(b), Rules of Supreme Court of United States 2
Rule 10.2(c), Rules of Supreme Court of United States 2

Fed.R.Civ.P. 52(b) 6
Fed.R.Civ.P. 59(a)(2) 6
Fed.R.Civ.P. 60(b)(6) 6
N.C.R.App.P. 2 6
N.C.R.App.P. 21 5
N.C.R.App.P. 21(a)(1) 6

MISCELLANEOUS

N.C.P.I.--Crim. § 150.10 (Repl. Feb. 1985) 8
Marc M. Arkin, **The Prisoner's Dilemma; Life in the Lower Federal Courts After *Teague v. Lane***, 69 N.C.L.Rev. 371 (1991) 17

NO. _____

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GARY T. DIXON, Warden, Central Prison, Raleigh, North Carolina, and LACY H. THORNBURG, Attorney General of the State of North Carolina,

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DOUGLAS WILLIAMS, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioners, Gary T. Dixon, Warden of Central Prison, Raleigh, North Carolina, and Lacy H. Thornburg, Attorney General of the State of North Carolina (hereinafter "State"), request that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit in ***Williams v. Dixon***, ___ F.2d ___, No. 89-4001 (4th Cir., Mar. 13, 1992), ***reh'g denied***, ___ F.2d ___, No. 89-4001 (4th Cir., Apr. 17, 1992), which vacated Respondent Douglas Williams, Jr.'s death sentence.

OPINION BELOW

This petition seeks review of the published decision by the United States Court of Appeals for the Fourth Circuit, which is reproduced in the Appendix (App.) at A1-A24. The order of

the Fourth Circuit denying the State's petition for rehearing and suggestion for rehearing in banc is found in the Appendix at A25.

JURISDICTION

The jurisdiction of this Court to review the Fourth Circuit's decision of March 13, 1992 (rehearing denied April 17, 1992) is invoked pursuant to 28 U.S.C. §1254(1) and Rule 10.1(b) and (c) of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AMENDMENTS AND STATUTORY PROVISIONS

U.S. Const. Amend. VIII: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted;

U.S. Const. Amend. XIV, §1: [N]or shall any state deprive any person of life, liberty, or property, without due process of law;

N.C.Gen.Stat. §15A-2000(b) (Cum. Supp. 1981):

> After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:
>
> (1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;
>
> (2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and
>
> (3) based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors.

STATEMENT OF THE CASE

On the night or early morning hours of August 1-2, 1981, the Respondent, Douglas Williams, Jr. (hereinafter referred to as "Williams"), tortured and battered a 100-year-old female victim (Adah Herndon Dawson) with two metal cuckoo clock weights, ransacked her home, rammed a mop handle into her vagina with such force as to cause multiple fractures of her sacrum and pubic bones, and left her to die in a pool of her own blood. ***State v. Williams***, 308 N.C. 47, 50-56, 301 S.E.2d 335, 339-42, ***cert. denied***, 464 U.S. 865, ***reh'g denied***, 464 U.S. 1004 (1983). On August 2, 1981, after initially denying any involvement, Williams admitted committing the crime and was arrested. Williams' bloody footprints also were found at the scene, his fingerprints were identified on various objects in the Dawson home, and he had forged the signature on a check from Mrs. Dawson's checkbook.

On August 17, 1981, Williams was indicted for the first-degree murder of Mrs. Dawson. He pleaded not guilty and was tried at the November 16, 1981 Criminal Session of the Superior Court of Edgecombe County. The jury found Williams guilty of first-degree murder under the felony murder rule for having murdered Mrs. Dawson during the perpetration of a first-degree burglary, as well as during the perpetration of a sex offense, and also on the theory that the murder was committed with premeditation and deliberation.

At the sentencing hearing convened pursuant to N.C.Gen.Stat. §15A-2000 (Cum. Supp. 1981), the trial court submitted four possible aggravating circumstances, which the jury found from the evidence and beyond a reasonable doubt: (1) that the murder was committed while Williams was engaged in the commission of first-degree burglary [N.C.Gen.Stat. §15A-

2000(e)(5)]; (2) that the murder was committed while Williams was engaged in a sexual act [N.C.Gen.Stat. §15A-2000(e)(5)]; (3) that the murder was committed for pecuniary gain [N.C.Gen.Stat. §15A-2000(e)(6)]; and (4) that the murder was especially heinous, atrocious or cruel [N.C.Gen.Stat. §15A-2000(e)(9)]. (App. A45-A46) The trial court submitted five possible mitigating circumstances, which the jury answered as follows:

(1) Does the defendant have a significant history of prior criminal activity?

Answer: Yes. [N.C.Gen.Stat. §15A-2000(f)(1)];

(2) Was the defendant under the influence of mental or emotional disturbance at the time of the murder?

Answer: No. [N.C.Gen.Stat. §15A-2000(f)(2)];

(3) Was the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law impaired?

Answer: No. [N.C.Gen.Stat. §15A-2000(f)(6)];

(4) The age of the defendant at the time of the murder?

Answer: No. [N.C.Gen.Stat. §15A-2000(f)(7)]; and

(5) Do you find any other circumstances arising from the evidence which the jury deems to have mitigating value?

Answer: No. [N.C.Gen.Stat. §15A-2000(f)(9)].

(App. A46-A47)

The jury then determined from the evidence and beyond a reasonable doubt that the aggravating circumstances found to exist were sufficient to outweigh the mitigating circumstances, and that the aggravating circumstances were sufficiently substantial to warrant the imposition of the death penalty. (App. A47) Based on its answers, the jury recommended a sentence of death, and on November 20, 1981 the state court judge imposed a death sentence. (App. A55-A57)

Williams appealed, and on April 5, 1983 the North Carolina Supreme Court found no error in either the guilt or sentencing phases of Williams' trial. ***State v. Williams***, 308 N.C. 47, 301 S.E.2d 335 (1983). Thereafter, Williams filed a Petition for Writ of Certiorari in this Court, which was denied on October 3, 1983. ***Williams v. North Carolina***, 464 U.S. 865, ***reh'g denied***, 464 U.S. 1004 (1983).

On May 7, 1984, Williams filed a Motion for Appropriate Relief in state court pursuant to N.C.Gen.Stat. §15A-1415 (Cum. Supp. 1981), in which he claimed, ***inter alia***, that the sentencing instructions violated ***Lockett v. Ohio***, 438 U.S. 586 (1978) by requiring unanimous agreement of the jurors in order to find a mitigating circumstance. On June 17, 1985, the state court denied post-conviction relief, specifically holding that the unanimity requirement for finding mitigating circumstances was proper under ***State v. Kirkley***, 308 N.C. 196, 217-18, 302 S.E.2d 144, 156 (1983). Williams subsequently filed a Petition for Writ of Certiorari in the North Carolina Supreme Court pursuant to N.C.Gen.Stat. §7A-32(b) (1981), §15A-1422(c)(3) (1978), and N.C.R.App.P. 21, seeking review of the post-conviction Order, but the North Carolina Supreme Court denied certiorari on July 7, 1987. ***State v. Williams***, ___ N.C. ___, 358 S.E.2d 68 (1987).

On October 13, 1987, Williams filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 in the federal District Court below, again claiming, ***inter alia***, that the unanimity re-

quirement for mitigating circumstances violated ***Lockett***. On September 13, 1988, United States District Judge Terrence W. Boyle entered a Judgment and 53-page unpublished Order denying Williams' habeas petition, specifically holding that the instructions in Williams' case were distinguishable from the intervening decision in ***Mills v. Maryland***, 486 U.S. 367 (1988) because here the jury was allowed to reconsider mitigating evidence in determining whether the aggravating circumstances outweighed the mitigating circumstances by proof beyond a reasonable doubt. Williams subsequently filed in the District Court a "Motion for Relief from Judgment and/or Alter or Amend the Judgment Pursuant to Fed.R.Civ.P. 52(b), 59(a)(2), and 60(b)(6)." Judge Boyle denied the motions on December 6, 1988.

Williams gave notice of appeal, and on January 24, 1989 Judge Boyle granted probable cause to appeal. Following briefing, Williams' appeal was argued before a panel of the Fourth Circuit on November 2, 1989. One of the contentions briefed and argued by Williams on appeal was that the trial court's sentencing instructions required unanimous agreement by the jurors as to the existence of mitigating circumstances in violation of ***Mills***.

On March 5, 1990, this Court decided ***McKoy v. North Carolina***, 494 U.S. 433 (1990), which held that North Carolina's unanimity requirement for mitigating circumstances, previously approved in ***State v. Kirkley***, 308 N.C. at 217-18, 302 S.E.2d at 156, violated ***Mills***. By letter of supplemental authorities to the Fourth Circuit dated March 12, 1990, the State pleaded that the relief sought by Williams based upon ***McKoy*** would create a new rule under ***Teague v. Lane***, 489 U.S. 288 (1989), which could not be applied retroactively to Williams' already final conviction and death sentence.

On March 16, 1990, Williams petitioned the North Carolina Supreme Court to exercise its supervisory jurisdiction under N.C.R.App.P. 2 and 21(a)(1), as well as Article IV, §12 of

the North Carolina Constitution, to review his death sentence in light of ***McKoy***. Contemporaneously, Williams filed in the Fourth Circuit a motion to defer further proceedings on his appeal pending re-exhaustion of his claim that North Carolina's procedure under which he was sentenced to death unconstitutionally precluded the jury from giving effect to proffered mitigating evidence because of the unanimity requirement. On April 24, 1990, the Fourth Circuit granted Williams' motion to hold its decision on appeal in abeyance "pending disposition by the Supreme Court of North Carolina in ***McKoy v. North Carolina*** and related cases and the petitioner's motion to remand."

On October 3, 1990, following its decisions in ***State v. McKoy***, 327 N.C. 31, 394 S.E.2d 426 (1990) and ***State v. McNeil***, 327 N.C. 388, 395 S.E.2d 106 (1990), ***cert. denied***, ___ U.S. ___, 111 S.Ct. 1403 (1991), the North Carolina Supreme Court entered an order dismissing Williams' petition. ***State v. Williams***, ___ N.C. ___, 397 S.E.2d 237 (1990).

On November 6, 1990, the Fourth Circuit ordered the case "returned to the active calendar for oral argument" and granted the parties' request for supplemental briefing "on all issues previously litigated." Following supplemental briefing by the parties, in which the State argued that Williams' ***Mills/McKoy*** claim was barred by the non-retroactivity principles of ***Teague***, the Fourth Circuit panel heard reargument of the appeal on April 8, 1991. On March 13, 1992, the Fourth Circuit panel issued its opinion vacating Williams' death sentence and remanding for resentencing because the sentencing instructions violated ***Mills*** and ***McKoy***. (App. A7-A17) On March 25, 1992, the State sought rehearing ***en banc***, but the Fourth Circuit denied the petition on April 17, 1992. (App. A25) On April 21, 1992, the State filed a motion seeking to stay the mandate pending its petition for writ certiorari to this Court, which the Fourth Circuit granted on April 23, 1992. (App. A26)

REASONS WHY THE WRIT SHOULD ISSUE

Over ten years after his conviction, the Fourth Circuit panel vacated Williams' death sentence for the first-degree murder of Mrs. Dawson due to sentencing instructions deemed to be unconstitutional under this Court's intervening 1990 decision in ***McKoy v. North Carolina***, even though North Carolina law in effect at the time Williams' death sentence became final approved the unanimity requirement for finding mitigating as well as aggravating circumstances. ***State v. Kirkley***, 308 N.C. at 217-18, 302 S.E.2d at 156, ***overruled in part in, McKoy v. North Carolina***, 494 U.S. 433 (1990).[1]

The panel's decision held that the instructions given at Williams' sentencing proceeding in November of 1981 were "identical" to the sentencing instructions in ***McKoy***,[2] and that Williams is entitled to the benefit of the ruling in ***McKoy*** notwithstanding the newly-announced principles of non-retroac-

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1 The panel's decision mistakenly asserts that "[a]t the time of Williams' ***trial***, a North Carolina capital sentencing jury was required to 'unanimously find that a mitigating circumstance exist[ed] before it [could] be considered for the purpose of sentencing.'" (App. A8, ***citing***, ***State v. Kirkley***, 308 N.C. 196, 218, 302 S.E.2d 144, 157 (1983)) However, in November of 1981, North Carolina law had not addressed and did not impose a unanimity requirement for the finding of mitigating circumstances. ***Kirkley*** was not decided until May 3, 1983, almost one month ***after*** the North Carolina Supreme Court upheld Williams' death sentence on direct appeal, and five months before this Court denied certiorari. North Carolina's pattern jury instructions were not updated to incorporate ***Kirkley's*** unanimity requirement until February of 1985. N.C.P.I.--Crim. §150.10 (Repl. Feb. 1985).

2 In fact, the sentencing instructions are not identical since in ***McKoy*** the trial court specifically charged the jury that it had to be unanimous to find each mitigating circumstance, ***McKoy v. North Carolina***, 494 U.S. at 436, whereas here the judge only alluded to the unanimity requirement in relation to the second main issue -- whether the jurors found one or more of the specified mitigating circumstances. (App. A28, A34-A39) It was not until the jury returned with a question about Issue Two that the judge clarified that the jury had to be unanimous in order to find a mitigating circumstance. (App. A42-A43)

tivity analysis in ***Teague***. (App. A9, A17) The panel avoided ***Teague*** by concluding that the rules in ***Mills*** and ***McKoy*** meet the second **Teague** exception for "bedrock procedural elements" and are "implicit in ordered liberty" such that they should be applied retroactively to Williams' already final death sentence. (App. A16-A17) The panel also held, as an alternative ground for its decision, that ***Teague's*** retroactivity analysis is not jurisdictional in nature, but is an affirmative defense which must be asserted below to the district court or else is deemed to be waived, citing ***Hanrahan v. Greer***, 896 F.2d 241, 245 (7th Cir. 1990). (App. A17-A23) The panel concluded that since the State did not raise the retroactivity issue at the District Court level, and did not assert ***Teague*** on appeal until after ***McKoy*** was decided, the State waived any ***Teague*** defenses to the retroactive application of ***Mills*** and ***McKoy***. Circuit Judge Widener separately concurred in the result (***Mills*** and ***McKoy*** retroactive under second ***Teague*** exception), but "would hold that the State did not waive the ***Teague*** question as a defense." (App. A24)

I. THE FOURTH CIRCUIT'S EXTRAORDINARY HOLDING THAT *MILLS* AND *MCKOY* MAY BE APPLIED RETROACTIVELY UNDER *TEAGUE'S* SECOND EXCEPTION CONFLICTS WITH THIS COURT'S OWN EIGHTH AMENDMENT JURISPRUDENCE, AS WELL AS WITH OTHER CIRCUIT COURTS, AND THEREFORE CERTIORARI REVIEW IS NECESSARY TO RESOLVE THIS IMPORTANT ISSUE OF CONSTITUTIONAL LAW.

In ***Teague***, which was decided over five months ***after*** the federal district court denied Williams' habeas petition, this Court adopted for the first time the principle that "new rules will not be applied or announced in cases on collateral review unless they fall into one of two exceptions." ***Penry v. Lynaugh***, 492 U.S. 302, 313 (1989), ***citing***, ***Teague v. Lane***, 489 U.S. at 311-13. The

Fourth Circuit seized upon ***Teague***'s second exception for "watershed rules of criminal procedure," ***Teague v. Lane***, 489 U.S. at 311-14, and applied ***Mills*** and ***McKoy*** retroactively to Williams' death sentence, equating ***Mills*** and ***McKoy*** with such "bedrock procedural elements" as ***Gideon v. Wainwright***, 372 U.S. 335 (1963) (right to counsel):

> Given the history of the Eighth Amendment jurisprudence and the constitutional requirement of individualized sentences, we believe that a rule striking down an arbitrary unanimity requirement has the same "primacy and centrality" of ***Gideon***.

(App. A17) However, in ***Sawyer v. Smith***, 497 U.S. 227, 110 S.Ct. 2822 (1990), this Court declined to interpret this second exception broadly and reemphasized that because the second ***Teague*** exception is directed "only at new rules essential to the accuracy and fairness of the criminal process, it is 'unlikely that many such components of basic due process have yet to emerge.'" ***Sawyer v. Smith***, 497 U.S. at ___, 110 S.Ct. at 2831, ***quoting***, ***Teague v. Lane***, 489 U.S. at 313.

Sawyer expressly refused to extend ***Teague***'s second exception to the new rule of ***Caldwell v. Mississippi***, 472 U.S. 320 (1985). Even though it was designed to enhance the accuracy of capital sentencing, the ***Caldwell*** rule did not meet the "bedrock procedural elements" requirement of an "absolute prerequisite to fundamental fairness." ***Sawyer v. Smith***, 497 U.S. at ___, 110 S.Ct. at 2832, ***quoting***, ***Teague v. Lane***, 489 U.S. at 314.

> It is difficult to see any limit to the definition of the second exception if cast as proposed by petitioner. All of our Eighth Amendment jurisprudence concerning capital sentencing is directed toward the enhancement of reliability and accuracy in some sense. Indeed, petitioner has not suggested any Eighth Amendment rule that would not be sufficiently "fundamental" to qualify for the

> proposed definition of the exception, and at oral argument in this case counsel was unable to provide a single example. [citation omitted] In practical effect, petitioner asks us to overrule our decision in ***Penry*** that ***Teague*** applies to new rules of capital sentencing. This we decline to do.

Sawyer v. Smith, 497 U.S. at ___, 110 S.Ct. at 2832. ***McKoy*** already had been decided by the time this Court handed down ***Sawyer***, but was not cited as an example of a new rule meeting ***Teague***'s second exception for "bedrock" principles.

The Fourth Circuit nevertheless reasoned that ***Mills*** and ***McKoy*** met the test for "bedrock procedural elements" since the procedures they invalidated have been described as "arbitrary" and "capricious." (App. A16-A17, ***citing***, ***McKoy v. North Carolina***, 494 U.S. at 454 (Kennedy, J., concurring)) The Fourth Circuit's decision is the first known case applying ***Teague***'s second exception in the Eighth Amendment context. Except for the ***Caldwell*** rule in ***Sawyer***, this Court directly has not addressed the definition of a "bedrock" Eighth Amendment principle under **Teague's** second exception, and this case provides an ideal vehicle for such analysis. Moreover, as this Court noted in ***Sawyer***, the "practical effect" of the Fourth Circuit's decision casts significant doubt on the continued viability of ***Teague*** to alleged errors in capital sentencing instructions.

The ***Mills/McKoy*** rule is not an "'absolute prerequisite to fundamental fairness,' (citation omitted), of the type that may come within ***Teague***'s second exception." ***Sawyer v. Smith***, 497 U.S. at ____, 110 S.Ct. at 2832. As in ***Saffle v. Parks***, 494 U.S. 484 (1990), which challenged an antisympathy capital sentencing instruction, the unanimity requirement found to be unconstitutional in ***Mills*** and ***McKoy*** concerned "***how*** [the jury] must consider the mitigating evidence, not "***what*** mitigating evidence the jury must be permitted to consider in making its sentencing decision." ***Saffle v. Parks***, 494 U.S. at 490 (emphasis in original).

"What petitioner complains of here is not a limitation upon what the sentencer was allowed to give effect to, but rather a limitation upon the ***manner*** in which it was allowed to do so--viz., only unanimously." ***McKoy v. North Carolina***, 494 U.S. at 465-66 (Scalia, J., dissenting). Possible examples of "bedrock" rules in the capital sentencing context include ***Gregg v. Georgia***, 428 U.S. 153 (1976) (bifurcated proceeding allowing jury to consider evidence relevant to sentence does not violate Eighth Amendment), or ***Woodson v. North Carolina***, 428 U.S. 280 (1976) (mandatory death penalty unconstitutional). In contrast, ***Mills*** and ***McKoy*** do not constitute an emerging component of basic due process "without which the likelihood of an accurate conviction [or death sentence] is seriously diminished." ***Teague v. Lane***, 489 U.S. at 313. In fact, both decisions are premised entirely upon the mere ***possibility*** that a hypothetical juror ***may*** have been precluded from finding and considering mitigating evidence or a mitigating circumstance, not that such preclusion did occur in a specific case. In the context of whether it would be a "fundamental miscarriage of justice" not to overlook a procedural default of a claim based on ***Caldwell***, this Court recently stated:

> Demonstrating that an error is by its nature the kind of error that ***might have affected*** the accuracy of a death sentence is far from demonstrating that an individual defendant probably is "actually innocent" of the sentence he or she received.

Dugger v. Adams, 489 U.S. 401, 410 n. 6 (1989) (emphasis added). Similarly, the ***Mills/McKoy*** rule does not equate to "bedrock procedural elements" such as the right to counsel recognized in ***Gideon***. Contrary to the Fourth Circuit's suggestion, the ***Mills/McKoy*** rule striking down the unanimity requirement for mitigating circumstances is not "implicit in the concept of ordered liberty." (App. A15, ***quoting***, ***Teague v. Lane***, 489 U.S. at 307) "Whatever one may think of the importance of [Williams'] proposed rule, it has none of the primacy and centrality of the rule

adopted in ***Gideon*** or other rules which may be thought to be within the exception." ***Saffle v. Parks***, 494 U.S. at 495.

Other recent federal court decisions which have addressed the retroactivity of ***Mills*** and ***McKoy*** under ***Teague*** have reached a different conclusion than the Fourth Circuit.[3]

In ***Thomas v. Jones***, 742 F.Supp. 598 (S.D. Ala. 1990), ***aff'd***, ____ F.2d ____ (11th Cir., July 11, 1990) (unpublished), ***cert. and stay denied***, ____ U.S. ____, 111 S.Ct. 1 (1990), Chief United States District Judge Alex Howard, Jr., of the United States District Court for the Southern District of Alabama--Southern Division, held that ***Mills*** and ***McKoy*** announced a "new rule" under ***Teague***, and since the new rule does not come within either of the two narrow exceptions to the non-retroactivity doctrine of ***Teague***, the habeas petitioner (Wallace Norrell Thomas) "was not entitled to its retroactive application." ***Thomas v. Jones***, 742 F.Supp. at 602. Thomas since has been executed by the State of Alabama.

In ***Cordova v. Collins***, 953 F.2d 167 (5th Cir. 1992), the Fifth Circuit agreed that ***Mills*** was a new rule which was not dictated by precedent at the time Cordova's conviction became final, and thus was barred by ***Teague***. ***Cordova v. Collins***, 953 F.2d at 173.

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3 Relying on language in ***McDougall v. Dixon***, 921 F.2d 518, 539 (4th Cir. 1990), ___ U.S. ___, 111 S.Ct. 2840 (1991), the lower federal district courts in North Carolina have held the ***Mills/McKoy*** claim is not cognizable on federal habeas review pursuant to ***Teague***. ***Smith v. Dixon***, 766 F.2d 1370, 1377-78 (E.D.N.C. 1991), ***appeal pending***, Nos. 91-4011, -4012 (4th Cir.); ***Gardner v. Dixon***, No. C-88-179-WS (M.D.N.C., Sept. 11, 1991) (Slip op. at 64-68), ***aff'd***, ___ F.2d ___, No. 91-4010 (4th Cir., June 4, 1992); ***Lawson v. Dixon***, No. C-88-738-S (M.D.N.C., Jan. 7, 1992) (Slip op. at 29-35), ***appeal pending***, No. 92-4003, -4004 (4th Cir.).

There are no known decisions agreeing with the Fourth Circuit's ***Teague*** analysis of ***Mills*** and ***McKoy***. In ***Zettlemoyer v. Fulcomer***, 923 F.2d 284, 306 n. 19 (3rd Cir.), ***cert. denied***, ____ U.S. ____, 112 S.Ct. 280 (1991), the Third Circuit panel majority did not engage in a ***Teague*** retroactivity analysis, preferring instead to address the merits and find the non-explicit instructions distinguishable from ***Mills***. However, Circuit Judge Sloviter, though dissenting from the panel majority on the issue whether the sentencing instructions were ambiguous on the unanimity requirement and therefore violated ***Mills***, would have held that the ***Mills*** claim was ***Teague***-barred: "I believe it is likely that the Supreme Court would view ***Mills*** as announcing a new rule and thus this claim also is subject to the almost insurmountable barrier on retroactive application announced in ***Teague***." ***Zettlemoyer v. Fulcomer***, 923 F.2d at 317 n. 3.

The ***Williams*** decision applying ***Mills*** and ***McKoy*** retroactively potentially could affect not only 17 other North Carolina cases[4] which already were final when ***Mills*** was decided, but also

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4 ***State v. Zuniga***, 320 N.C. 233, 357 S.E.2d 898, **cert. denied**, 484 U.S. 959 (1987); ***State v. (Thomas Jack) Brown***, 320 N.C. 179, 358 S.E.2d 1, ***cert. denied***, 484 U.S. 970 (1987); ***State v. Robbins***, 319 N.C. 465, 356 S.E.2d 279, **cert. denied**, 484 U.S. 918 (1987); ***State v. (Willie) Brown***, 315 N.C. 40, 337 S.E.2d 808 (1985), ***cert. denied***, 476 U.S. 1165 (1986); ***State v. Huffstetler***, 312 N.C. 92, 322 S.E.2d 110 (1984), ***cert. denied***, 471 U.S. 1009 (1985); ***State v. Noland***, 312 N.C. 1, 320 S.E.2d 642 (1984), ***cert. denied***, 469 U.S. 1230, ***reh'g denied***, 471 U.S. 1050 (1985); ***State v. Gardner***, 311 N.C. 489, 319 S.E.2d 591 (1984), ***cert. denied***, 469 U.S. 1230 (1985), ***denial of habeas relief affirmed in, sub nom., Gardner v. Dixon***, ___ F.2d ___, No. 91-4010 (4th Cir., June 4, 1992) (petition for reh'g pending, filed June 18, 1992); ***State v. Boyd***, 311 N.C. 408, 319 S.E.2d 189 (1984), ***cert. denied***, 471 U.S. 1030 (1985); ***State v. Lawson***, 310 N.C. 632, 314 S.E.2d 493 (1984), ***cert. denied***, 471 U.S. 1120 (1985), ***habeas relief denied in, sub nom., Lawson v. Dixon***, No. C-88-738-S (M.D.N.C., Jan. 7, 1992), ***appeal pending***, ___ F.2d ___, Nos. 92-4003, -4004 (4th Cir.); ***State v. Anthony and Craig***, 308 N.C. 446, 302 S.E.2d 740, ***cert. denied***, 464 U.S. 908 (1983); ***State v. Brown***, 306 N.C. 151, 293 S.E.2d 569 (1982), ***cert. denied***, 459 U.S. 1080 (1982); ***State v. Pinch***, 306 N.C. 1, 292 S.E.2d 203 (1982), ***cert. denied***, 459 U.S. 1056, ***reh'g denied***, 459 U.S. 1189 (1982); ***State v. Smith***, 305 N.C. 691, 292 S.E.2d 264 (1982), **cert. denied**, 459

similar claims in other circuits and states. ***See, e.g., James v. Whitley***, 926 F.2d 1433, 1446-49 (5th Cir. 1991); ***Kordenbrock v. Scroggy***, 919 F.2d 1091, 1120-21 (6th Cir. 1990) (***en banc***), ***cert. denied***, ___ U.S. ___, 111 S.Ct. 1608 (1991); ***State v. Petary***, 790 S.W.2d 243, 244-46 (Mo. banc 1990), ***cert. denied***, ___ U.S. ___, 111 S.Ct. 443 (1990); ***People v. Rodriguez***, 794 P.2d 965, 980-81 (Colo. 1990), ***citing***, ***People v. Davis***, 794 P.2d 159, 194-96 (Colo. 1990), ***cert. denied***, ___ U.S. ___, 111 S.Ct. 770 (1991); ***State v. Green***, ___ S.C. ___, ___, 392 S.E.2d 157, 163 (1990), ***cert. denied***, ___ U.S. ___, 111 S.Ct. 229, ***reh. denied***, ___ U.S. ___, 111 S.Ct. 548 (1990); ***State v. Patterson***, 299 S.C. 280, 286, 384 S.E.2d 699, 703 (1989), ***cert. granted, judgment vacated, and remanded for further consideration on other grounds***, ___ U.S. ___, 110 S.Ct. 709 (1990), ***reaffirmed in***, ___ S.C. ___, 396 S.E.2d 366 (1990); ***Ex parte Martin***, 548 So.2d 496, 498 (Ala. Cr. App. 1989), ***cert. denied***, ___ U.S. ___, 110 S.Ct. 419 (1989); ***Commonwealth v. Frey***, 520 Pa. 338, 346-48, 554 A.2d 27, 30-31 (1989), ***cert. denied***, ___ U.S. ___, 110 S.Ct. 1500 (1990); ***State v. Clark***, 108 N.M. 288, 772 P.2d. 322 (1989). ***But see, State v. Henderson***, 109 N.M. 655, 664, 789 P.2d 603, 612 (1990) ***Cf., Rodriguez v. Colorado***, ___ U.S. ___, ___, 111 S.Ct. 770, 770-73 (1991) (Marshall, J., dissenting from denial of certiorari on issue whether Colorado capital sentencing instructions, which required unanimity only as to findings of aggravating circumstances and did not provide for voting upon existence of mitigating circumstances, violated ***Mills*** and ***McKoy***); ***House v. Tennessee***, ___ U.S. ___, ___, 111 S.Ct. 284, 284-87 (1990) (Marshall, J., dissenting from denial of certiorari on issue whether

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(Footnote Continued)

U.S. 1056 (1982), ***habeas relief granted on other ground sub nom., Smith v. Dixon***, 766 F.Supp. 1370 (E.D.N.C. 1991), ***appeal pending***, ___ F.2d ___, Nos. 91-4011, -4012 (4th Cir.); ***State v. Williams***, 305 N.C. 656, 292 S.E.2d 243 (1982), ***cert. denied***, 459 U.S. 1056, ***reh'g denied***, 459 U.S. 1189 (1982); ***State v. Taylor***, 304 N.C. 249, 283 S.E.2d 761 (1981), ***cert. denied***, 463 U.S. 1213, ***reh'g denied***, 463 U.S. 1249 (1983); ***State v. Oliver***, 302 N.C. 28, 274 S.E.2d 183 (1981), ***appeal following remand***, 309 N.C. 326, 307 S.E.2d 304 (1983).

Tennessee capital sentencing instructions, which did not require jury to list or vote upon the specific mitigating factors and required unanimity only as to the finding of aggravating circumstances, violated ***Mills*** and ***McKoy***). ***Compare***, ***Kubat v. Thieret***, 867 F.2d 351, 371-74 (7th Cir.) (Illinois trial court's instructions which required unanimous agreement as to the sufficiency of mitigating factors to preclude death sentence held to violate ***Mills***), ***cert. denied sub nom.***, ***Kubat v. Greer***, ___ U.S. ___, 110 S.Ct. 206 (1989).

If review of the Fourth Circuit's decision is denied, federal and state courts will be compelled on post-conviction review to extensively analyze the various sentencing instructions in already final cases for possible ***Mills/McKoy*** error, rather than simply hold that petitioners may not benefit retroactively from these decisions. Therefore, the Fourth Circuit's unprecedented holding applying the ***Mills/McKoy*** rule retroactively as a "bedrock" principle conflicts with **Sawyer** and other federal court decisions, and this important issue warrants resolution by the granting of certiorari.

II. THE FOURTH CIRCUIT'S DECISION ON NON-RETROACTIVITY AS AN AFFIRMATIVE DEFENSE ADOPTS A POSITION WHICH IS IN CONFLICT WITH THE MAJORITY OF THE OTHER CIRCUITS ON THIS ISSUE, AND RAISES AN IMPORTANT ISSUE WARRANTING REVIEW ON CERTIORARI.

The panel's decision that ***Teague*** and the principles of non-retroactivity are an affirmative defense and therefore must be raised as such by the respondent to a habeas action also warrants resolution on certiorari review. In ***Penry v. Lynaugh***, 492 U.S. at 313, this Court suggested that a federal habeas court must conduct the ***Teague*** retroactivity analysis as a "threshold" matter, before

reaching, for example, the issues of abuse of the writ or the merits. In ***Teague*** itself, the Court addressed the question of retroactivity ***sua sponte*** even though it had been raised only in an ***amicus*** brief. ***Teague v. Lane***, 489 U.S. at 300. Likewise, the Court addressed the retroactivity issue ***sua sponte*** in ***Saffle v. Parks***, ***supra***. ***Saffle v. Parks***, 494 U.S. at 496 n. 1 (Brennan, J., dissenting) ("Although the case was briefed and argued after ***Teague***, neither of the parties nor any ***amicus*** briefed the retroactivity issue."). ***See also Sawyer v. Smith***, 497 U.S. at ___, 110 S.Ct. at 2826 (noting that after hearing ***en banc*** oral argument, the Fifth Circuit requested supplemental briefing from the parties on the question whether the intervening decision in ***Teague*** barred Sawyer's claim for relief under ***Caldwell***). The panel dismissed these precedents based on the subsequent decision in ***Collins v. Youngblood***, 497 U.S. 37, 110 S.Ct. 2715 (1990), wherein the Court remarked that "[a]lthough the ***Teague*** rule is grounded in important considerations of federal-state relations, we think it is not 'jurisdictional' in the sense that this Court, despite a limited grant of certiorari, ***must*** raise and decide the issue ***sua sponte***." ***Collins v. Youngblood***, 497 U.S. at ___, 110 S.Ct. at 2718 (emphasis in original). However, the fact that ***Teague*** is not "jurisdictional" does not dictate that ***Teague*** is an affirmative defense which must have been raised in the first instance at the district court level. In ***Collins***, the State of Texas did not address retroactivity in its petition for certiorari or its briefs on the merits, and when asked about the issue at oral argument counsel answered that Texas had chosen not to rely on ***Teague***. ***Id***. At most, ***Collins*** suggests that this Court would have addressed the ***Teague*** issue if Texas had briefed it, or at least not eschewed it.

Therefore, this Court has not yet decided whether a state waives the ***Teague*** defense by failing to timely raise it either in the federal district court or on appeal to the circuit court. ***See*** Marc M. Arkin, ***The Prisoner's Dilemma; Life in the Lower Federal Courts After Teague v. Lane***, 69 N.C.L.Rev. 371, 415-16 (1991) ("The question of when the government may waive a

Teague nonretroactivity defense is not clearly settled. . . While the Supreme Court has now decided that the government ***may*** explicitly waive a ***Teague*** nonretroactivity claim, it has not given the lower courts guidance regarding any other circumstances under which such a waiver should be found." (footnotes omitted)). Only two current Justices have suggested that a state should be deemed to waive the non-retroactivity defense if it failed to raise it in the lower federal court. ***Penry v. Lynaugh***, 492 U.S. at 349 (Stevens, J., joined by Blackmun, J., concurring in part and dissenting in part) ("Nor am I at all sure that courts should decide the retroactivity issue if it was not raised below."); ***Zant v. Moore***, 489 U.S. 836, 837 (1989) (Blackmun, J., dissenting) (State of Georgia waived the non-retroactivity defense by failing to raise it in the lower federal courts).

The circuit courts which directly have addressed the waiver issue are sharply divided whether it is appropriate to consider the ***Teague*** analysis without the issue having been raised by the parties. ***Compare***, ***e.g.***, ***Smith v. Black***, 904 F.2d 950, 981 n. 12 (5th Cir. 1990) (***Teague*** issue may be considered though not raised by the state until supplemental briefing), ***cert. granted and judgment vacated on other grounds***, ___ U.S. ___, 112 S.Ct. 1463 (1992); ***Hill v. McMackin***, 893 F.2d 810, 813 (6th Cir. 1989) (deciding application of ***Teague*** despite parties' failure to address issue), ***disapproved on other grounds***, ***Ylst v. Nunnemaker***, ___ U.S. ___, 111 S.Ct. 2590 (1991), ***as noted in***, ***Couch v. Jabe***, 951 F.2d 94, 96 (6th Cir. 1991) (***per curiam***); ***and***, ***Hopkinson v. Shillinger***, 888 F.2d 1286, 1288 (10th Cir. 1989) (***en banc***) (non-retroactivity is not waived and should be considered despite state's failure to interpose defense), ***cert. denied***, ___ U.S. ___, 110 S.Ct. 3256 (1990), ***with***, ***Kordenbrock v. Scroggy***, 919 F.2d at 1104 n. 4 ("The state has waived any argument based on ***Teague***."); ***Hanrahan v. Greer***, 896 F.2d at 245 (State of Illinois waived non-retroactivity as a defense by raising it for the first time on appeal), ***later appeal sub nom.***, ***Hanrahan v. Thieret***, 933 F.2d 1328, 1337 n. 19 (7th Cir.), ***cert. denied***, ___ U.S. ___, 112 S.Ct.

446 (1991). On remand in ***Moore v. Zant***, 885 F.2d 1497 (11th Cir. 1989) (***en banc***), ***cert. denied***, ____ U.S. ____, 110 S.Ct. 3255 (1990), the Eleventh Circuit plurality, because of its abuse of the writ disposition of Moore's claims, did not address whether the State of Georgia had waived non-retroactivity as a defense. ***Moore v. Zant***, 885 F.2d at 1503. ***But compare***, ***Moore v. Zant***, 885 F.2d at 1519 n. 5 (Kravitch, J., dissenting) (***Teague*** is not an affirmative defense), **and**, ***Id.*** at 1524 (Johnson, J., dissenting) ("It appears that non-retroactivity is an affirmative defense"). ***See also Card v. Dugger***, 911 F.2d 1494, 1523 n. 30 (11th Cir. 1990) (disposing of ***Caldwell*** claim on basis of procedural default since district court did not address retroactivity and state had not raised it on appeal). Analogizing to ***Granberry v. Greer***, 481 U.S. 129 (1987), in which this Court discussed waiver by a state of the non-exhaustion defense, the Ninth Circuit recently took a different intermediary approach and held that a court of appeals has the discretion, but is not required to address the ***Teague*** defense which has been raised for the first time on appeal or, perhaps, even in a petition for rehearing. ***Boardman v. Estelle***, 957 F.2d 1523, 1534-37 (9th Cir. 1992) (opinion supplemented by denial of rehearing on Mar. 11, 1992), ***cert. pending***, ___ U.S. ___, No. 91-2006 (petition filed June 8, 1992). Therefore, this conflict and inconsistent analysis of ***Teague*** waiver by the circuit courts requires resolution, and this case presents an ideal vehicle for that decision.[5]

The panel's reliance on ***Hanrahan***, in addition to being the minority position, was inappropriate since ***Hanrahan*** is distinguishable on its facts. In ***Hanrahan***, the intervening decision

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5 The panel's citation to and reliance on ***Maynard v. Dixon***, 943 F.2d 407, 418 (4th Cir. 1991), ***cert. denied***, ____ U.S. ____, 112 S.Ct. 1211 (1992), for the proposition that the State may be deemed to waive the defense of non-retroactivity (App. A23), is surprising since the panel in ***Maynard*** merely made the assumption, "***without deciding***." The same waiver of the ***Teague*** defense also was pending in Williams' case, and therefore the ***Maynard*** panel obviously chose to address the merits rather than rely on ***Teague***.

in ***Cruz v. New York***, 481 U.S. 186 (1987) was announced while Hanrahan's habeas petition still was pending in the district court. The district court asked the parties for briefs on the effect of ***Cruz***, but the State "tackled the merits without suggesting that ***Cruz*** should not be applied to Homer's case." ***Hanrahan v. Greer***, 896 F.2d at 245. Here, in contrast, until ***McKoy*** was announced on March 5, 1990 there was not yet a "new rule" as to North Carolina's capital sentencing instructions which the State could have defended as non-retroactive. The federal and state courts, even after ***Mills*** was decided on June 6, 1988, continued to believe that ***Mills*** had no direct bearing on North Carolina's sentencing instructions. ***State v. McKoy***, 323 N.C. 1, 30-44, 372 S.E.2d 12, 27-36 (1988), ***rev'd and remanded sub nom.***, ***McKoy v. North Carolina***, 494 U.S. 433 (1990). In other words, this Court did not make clear until ***McKoy*** that there was to be a "new rule" which the State should seek to defend as non-retroactive, even on pre-***Teague*** grounds.

Moreover, the State's Answer to Williams' habeas petition in the District Court was filed on November 25, 1987. The District Court's judgment denying relief was entered on September 13, 1988, well before this Court decided ***Teague*** on February 22, 1989. It was not until June 26, 1989, well after the District Court had issued its Judgment denying Williams' habeas petition, that this Court issued its decision in ***Penry***, holding that the non-retroactivity principles of ***Teague*** apply to capital cases on federal habeas review. Finally, at the time of the State's initial briefing and through the announcement of the ***McKoy*** decision on March 5, 1990, the definition of a "new rule" under ***Teague*** still was in doubt.

Consequently, the State could not have raised the ***Teague*** defense in the District Court since it simply did not yet exist at the time. "Arguably, the state could have raised the defense of non-retroactivity on other grounds, but they would have been largely irrelevant to the analysis required by ***Teague***." ***Hopkin-***

son v. Shillinger, 888 F.2d at 1288. Indeed, ***Penry*** clouded whether ***Mills*** and the pending decision in ***McKoy*** might be a "new rule" or merely an application of ***Lockett*** and ***Eddings v. Oklahoma***, 455 U.S. 104 (1982). Subsequent to the State's briefing and the oral arguments in November of 1989, this Court announced a number of significant decisions refining and clarifying the retroactivity principles of ***Teague***, including ***Saffle***, ***Sawyer***, and ***Butler v. McKellar***, 494 U.S. 407 (1990). While ***Teague*** and its progeny may not have created a new defense "which was previously unavailable to the State," ***Moore v. Zant***, 885 F.2d 1497, 1525 (11th Cir. 1989) (***en banc***) (Johnson, J., dissenting), it was only after the recent decisions in ***Butler*** and ***Saffle***, which were decided the same day as ***McKoy***, that the applicability of the ***Teague*** principles to Williams' claim was clarified. ***Butler*** expanded the concept of a "new rule" to include one that was "susceptible to debate among reasonable minds" under law prevailing at the time the habeas petitioner's conviction became final. In his ***Saffle*** dissent, former Justice Brennan obviously appreciated the importance of ***Butler's*** holding in relation to ***Teague*** and ***Penry***, even commenting that ***Butler*** itself constituted a "new standard" and was "novel." ***Saffle v. Parks***, 494 U.S. at 497 (Brennan, J., dissenting). ***Saffle***, and more recently ***Sawyer***, have made clear that the application of ***McKoy*** sought by Williams is not dictated by ***Lockett*** and ***Eddings***, and that the ***Mills/McKoy*** rule does not meet ***Teague's*** second exception for "bedrock procedural elements." The State raised the non-retroactivity issue as to Williams' ***McKoy*** claim as soon as reasonably possible after the decisions in ***Butler*** and ***Saffle*** made the defense plausible. Under the circumstances, the State could not have "missed the boat," as the panel colorfully suggests (App. A23), when the ticket for the boat had not even been printed. Therefore, this Court should grant certiorari to resolve the conflict whether a federal appellate court may address the ***Teague*** retroactivity question if the state failed to raise the issue in the district court.

CONCLUSION

For the foregoing reasons, the State respectfully prays and requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit which vacated Williams' death sentence and remanded his case for a new capital sentencing proceeding.

Respectfully submitted,

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

GARY T. DIXON, Warden, Central Prison,
Raleigh, North Carolina, and LACY H. THORNBURG,
Attorney General of the State of North Carolina,
Petitioners,

v.

DOUGLAS WILLIAMS, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX

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TABLE OF CONTENTS

Page

Opinion of the United States Court of Appeals for the Fourth Circuit in ***Williams v. Dixon***, ___ F.2d ___, No. 89-4001 (4th Cir., Mar. 13, 1992) A1

Order of Fourth Circuit, filed April 17, 1992, Denying the State's Petition for Rehearing and Suggestion for Rehearing **en banc** A25

Order of Fourth Circuit, filed April 21, 1992, Granting the State's Motion to Stay the Mandate Pending its Petition for Writ of Certiorari A26

State Trial Court's Sentencing Instructions to the Jury A27

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DOUGLAS WILLIAMS, JR., Petitioner-Appellant, v. GARY T. DIXON, Warden; ATTORNEY GENERAL OF NORTH CAROLINA, Respondents-Appellees.	)	No. 89-4001

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, District Judge. (CA-87-985-HC)

Argued: April 8, 1991

Decided: March 13, 1992

Before ERVIN, Chief Judge, WIDENER, Circuit Judge, and Butzner, Senior Circuit Judge.

Affirmed in part and vacated and remanded in part by published opinion. Chief Judge Ervin wrote the majority opinion, in which Senior Judge Butzner joined. Judge Widener wrote a concurring opinion.

COUNSEL

ARGUED: Mark Evan Olive, Atlanta, Georgia, for Appellant. Barry Steven McNeill, Special Deputy Attorney General, Joan Herre Byers, Special Deputy Attorney General, Raleigh, North Carolina, for Appellees. **ON BRIEF:** William F. Larimar, UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW, Chapel Hill, North Carolina, for Appellant. Lacy H. Thornburg, Attorney General of North Carolina, Raleigh, North Carolina, for Appellees.

OPINION

ERVIN, Chief Judge:

Douglas Williams, Jr. appeals the district court's denial of his petition for federal habeas corpus relief pursuant to 28 U.S.C. §2254. The core of Williams' arguments is that he did not have the mental capacity-because of organic brain damage and severe intoxication at the time of the offense-to have the requisite specific intent to be convicted of first-degree murder and sentenced to death. More specifically, he argues that he was not given the opportunity to prove that he lacked the requisite mental capacity-because of either ineffective assistance of counsel, or some other violation of his rights either at trial, at sentencing, on appeal, or in the post-conviction proceedings.

After this appeal was argued, the United States Supreme Court declared unconstitutional the North Carolina jury instruction requiring unanimity among the jurors before they could consider mitigating circumstances in death penalty sentencing deliberations. ***McKoy v. North Carolina***, 494 U.S. ___, 110 S. Ct. 1227 (1990). This jury instruction was given at Williams' trial. We affirm the district court's holding that the trial court did not commit constitutional error at the guilt phase of the trial; therefore, we do not disturb Williams' conviction. We further hold that Williams may receive the benefit of the rule set out in ***McKoy***; therefore, we vacate his sentence and remand to the district court.

I

On August 2, 1981, Williams was arrested and charged with the murder of Adah Herndon Dawson. A detailed description of the crime and the investigation leading to his arrest is set forth in ***State v. Williams***, 308 N.C. 47, 301 S.E.2d 335, 339-341 (1983). Williams pled not guilty. The jury found Williams guilty of first-degree murder. It concluded that he had murdered Dawson during the perpetration of a first-degree burglary, as well as during the perpetration of a sex offense, and that the murder was committed with malice and premeditation and deliberation. After the sentencing hearing, the jury imposed the death penalty which was ordered by the trial court judge.

On appeal, the conviction was upheld by the North Carolina Supreme Court on April 5, 1983. ***Williams***, 308 N.C. 47, 301 S.E.2d 335 (1983). The United States Supreme Court denied Williams' Petition for Writ of Certiorari on October 3, 1983. ***Williams v. North Carolina***, 464 U.S. 865 (1983). Williams' Petition for Rehearing was denied on November 28, 1983. ***Williams v. North Carolina***, 464 U.S. 1004 (1983).

On May 7, 1984, Williams filed a Motion for Appropriate Relief, a state post-conviction procedure, pursuant to N.C.G.S. §15A-1411 *et seq*. Twenty-one claims for relief were alleged in the motion, including ineffective assistance of counsel at trial and on appeal. During these proceedings, Williams new counsel filed numerous motions, all of which were denied by the state court judge.[1] The court did order that an evidentiary hearing be held on one claim-ineffective assistance of counsel at trial-and that Williams' remaining claims would "be heard on the record before the court and oral arguments."

The evideniary hearing was held on June 4-5, 1985, after which the state court judge entered an order denying Williams' post-conviction relief. The North Carolina Supreme Court denied Williams' petition for discretionary review.

On October 13, 1987, Williams filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 in the United States District Court for the Eastern District of North Carolina. The petition contained twenty-four claims for relief. The judge denied the petition without oral argument on September 13, 1988. From this denial of habeas corpus relief, Williams now appeals.

---

1 These included a Motion to Provide Funds for Experts and Investigative Assistance, a Motion to Produce Exculpatory Information, a Motion for Finding of Indigency, and a Motion for Independent Psychiatric Testing.

II

Williams raises three issues arising from the guilt phase of his trial. First, he contends that the imposition of the death penalty upon a mildly mentally retarded defendant violates the constitution. Second, he alleges that he did not receive effective assistance of counsel. Third, he asserts that the evidence was insufficient to support the jury's verdict finding Williams guilty of first-degree murder. We find no merit in any of these arguments.

A

The Supreme Court in ***Penry v. Lynaugh***, 492 U.S. 302 (1989), held that the execution of a mentally retarded defendant convicted of a capital offense is not categorically prohibited by the Eighth Amendment. This precedent forecloses this issue.

B

The standard by which to judge claims alleging ineffective assistance of counsel is set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). The standard in ***Strickland*** consists of two prongs. First, the court must inquire into the competence of the legal assistance in question. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." ***Id.*** at 688. In this regard, an attorney's conduct is to be accorded a great deal of deference, and a reviewing court should avoid second-guessing the attorney with the benefit of hindsight. The second prong of the test involves assessing whether, given that counsel's assistance was constitutionally deficient, this fact had a reasonable probability of affecting the outcome. In other words, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

Williams specifically argues three major errors in his representation. First, that his attorney should have sought out available witnesses who saw Williams staggering drunk near the time of the offense. Second, that he should have discovered readily available mental health experts who diagnosed Williams as mentally retarded and brain damaged at the time of the offense and who would testify that Williams' mental condition satisfied the test for statutory and nonstatutory mitigation. Third, the attorney unreasonably introduced Williams' nine prior convictions during his capital sentencing argument, even though the State could not have introduced the convictions.

After careful review of the record, we agree that Williams' attorney could have perhaps investigated the facts of the case more thoroughly and with more diligence. However, we cannot conclude that his conduct was unreasonable without engaging in excessive second-guessing, which we refuse to do. Moreover, in light of the evidence, we believe that the government has carried its burden of showing beyond a reasonable doubt that the verdict would not have been different even if Williams' counsel had been more diligent or had used different trial tactics. ***See Smith v. United States***, 60 U.S.L.W. 3434 (U.S. Dec. 17, 1991) (denial of certiorari) (Blackman, J., dissenting, and Stevens, J., dissenting).

C

We find the evidence to be sufficient to support the jury's verdict. In his confession, Williams stated that when he entered the Dawson house, he was looking for a place to sleep and thought that the house was deserted. Once inside, he was surprised by Dawson, who threw salt in his face. While in a state of alcohol and drug intoxication, he struck her with a stick he picked up on

the porch, knocking her down. After rummaging through the house, he went back into the kitchen and forced a mop handle into her vagina. The medical examiner found that Mrs. Dawson had severe cuts on her neck, face, scalp, ears, vagina, and rectum. She also had fractures of the skull, pubic bones, hip bones, and some facial bones.

Williams now argues that his confession contains no evidence of any deliberation or premeditation to kill Dawson. Furthermore, he claims he had no "intent to commit larceny" when he entered the house and thus could not be convicted of felony-murder with the underlying felony being burglary. In addition, he contends that the murder was not "in perpetration of" a sex offense.

As the district court found, these arguments have little merit. We find particularly weak the argument that this murder was not committed "in perpetration of" a sex offense. The nexus between the sex act and the murder that Williams claims is required for felony-murder is much too restrictive and burdensome. *See* ***State v. Williams***, 308 N.C. at 67, 301 S.E.2d at 348; ***State v. Powell***, 299 N.C. 95, 261 S.E.2d 114 (1980).

III

In his sentencing instructions, the judge listed the following considerations as possible mitigating factors: Williams' age; his mental problems and deficiencies; and his condition the night of the murder (allegedly intoxicated and under the influence of drugs).

In the sentencing proceedings, the jury was asked to answer unanimously four questions: (1) whether there were any aggravating factors (proved by the State); (2) whether there were any mitigating factors (proved by Williams); (3) whether the

aggravating circumstances outweighed the mitigating circumstances; and (4) whether the aggravating circumstances were sufficiently substantial to justify the imposition of the death penalty. At the time of Williams' trial, a North Carolina capital sentencing jury was required to "unanimously find that a mitigating circumstance exist[ed] before it [could] be considered for the purpose of sentencing." ***State v. Kirkley***, 308 N.C. 196, 218, 302 S.E.2d 144, 157 (1983).

This unanimity requirement was struck down by the United States Supreme Court in ***McKoy v. North Carolina***, ___ U.S. ___, 110 S.Ct. 1227 (1990). Following its reasoning in ***Mills v. Maryland***, 486 U.S. 367 (1988), the Court held that such a sentencing scheme "created 'a substantial probability that reasonable jurors ... well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular [mitigating] circumstance.'" ***McKoy***, 110 S.Ct. at 1230 (quoting ***Mills***, 486 U.S. at 384). The law is well established in this area that "'the sentencer [may] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less that death.'" ***Eddings v. Oklahoma***, 455 U.S. 104, 110 (1982) (quoting ***Lockett v. Ohio***, 438 U.S. 586, 604 (1978)). Under ***McKoy***, the unanimity requirement given to the jury at Williams' sentencing proceedings did limit the individual juror's consideration of mitigating circumstances and was, therefore, unconstitutional.

Since the United States Supreme Court's ***McKoy*** opinion, the North Carolina Supreme Court has held that that decision did not completely invalidate the North Carolina death penalty statute. *See* ***State v. McKoy***, 327 N.C. 31, 394 S.E.2d 426 (1990) ("***McKoy II***"). Consequently, Williams is not entitled to have his sentence automatically reduced to life imprisonment. As a result,

we must determine whether Williams can benefit from the rules set out by the Supreme Court in ***McKoy*** and its predecessor ***Mills***.

A

Williams' conviction became final in 1983,[2] ***State v. Williams***, 308 N.C. 47, 301 S.E.2d 335, *cert. denied*, 464 U.S. 865, *reh'g denied*, 464 U.S. 1004 (1983), before the decisions in the ***Mills*** and ***McKoy*** cases were handed down. Therefore, under the Supreme Court's holdings in ***Teague v. Lane***, 489 U.S. 288 (1989), and ***Penry v. Lynaugh***, 492 U.S. 302 (1989), if the decisions in ***Mills*** and ***McKoy*** are deemed to be "new rules," then Williams cannot receive the benefit of those rules even though the jury instructions were identical to those struck down in ***McKoy***.

In ***Teague***, the Supreme Court adopted Justice Harlan's general rule on nonretroactivity for cases on collateral review, which he set out in ***Mackey v. United States***, 401 U.S. 667, 675 (1971) (separate opinion). The general rule is that "new rules" should not be applied retroactively to cases on collateral review. ***Teague***, 489 U.S. at 305. There are two exceptions to the general rule. The first is that "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" ***Teague***, 489 U.S. at 307 (quoting ***Mackey***, 401 U.S. at 692 (separate opinion)). The second exception is that a new

---

2 The Supreme Court has defined final to mean where the judgment of conviction has been rendered, the availability of appeal has been exhausted, and the time for petition for certiorari has elapsed. ***Allen v. Hardy***, 478 U.S. 255, 258 n. 1 (1986) (quoting ***Linkletter v. Walker***, 381 U.S. 618, 622 n. 5 (1965)).

rule should be applied retroactively if it would "alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction" and "without which the likelihood of an accurate conviction is seriously diminished." ***Id.*** at 311-313. In ***Penry v. Lynaugh***, 492 U.S. 302 (1989), the Court held that the "new rule" limitation on the exercise of habeas corpus jurisdiction applies in both capital and noncapital cases.

B

The **Teague** Court defined a new rule as follows:

> In general,...a case announces a new rule when it breaks new ground or imposes a new obligation on the states or the Federal Government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.

Teague, 489 U.S. at 301. Normally, because Williams seeks the benefit of the rules in ***Mills*** and ***McKoy***, we would first have to determine whether those rules constitute new rules under ***Teague***. However, in this case, we find that even if ***Mills*** and ***McKoy*** are new rules, one of the exceptions to the nonretroactivity rule applies. Therefore, we will not address whether ***Mills*** and ***McKoy*** are new rules at this time.[3]

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3 We note that a previous panel of this court made a statement on this issue in ***McDougall v. Dixon,*** 921 F.2d 518 (4th Cir. 1990). There, we held that ***McKoy*** did not apply to the defendant's case, ***id.*** at 539; however we went on to state the following:

> ***McKoy*** is an extension of ***Mills v. Maryland,*** which was decided eight years after McDougald's conviction. The

C

The first exception is that new rules will apply retroactively if they place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." ***Teague,*** 489 U.S. at 307. The proscribed conduct in Williams' case is capital murder, and the prosecution of capital murder is not prohibited by ***Mills*** or ***McKoy***. ***See Butler v. McKellar***, ___ U.S. ___, 110 S. Ct. 1212, 1217 (1990) (noting that the prosecution of capital murder was not prohibited by the new rule in ***Arizona v. Roberson***, 486 U.S. 675 (1988)). Therefore, the first exception does not apply in this case.

The second exception, however, does apply to this case. "The precise contours of this exception may be difficult to discern,..." ***Saffle v. Parks***, ___ U.S. ___, 110 S.Ct. 1257, 1264 (1990). In a recent case, the Supreme Court further explained the scope of the second Teague exception as follows:

> In ***Teague***, we modified Justice Harlan's test to combine the accuracy element of the ***Desist*** test with the ***Mackey*** limitation of the exception to watershed rules of fundamental fairness. It is thus not enough under ***Teague*** to say that a new rule is aimed at improving the accuracy of the trial.

[FOOTNOTE CONTINUED]
McDougall facts are not the same as ***McKoy*** , but even if they were, the ***McKoy*** and ***Mills*** cases represent new law and would not be applied retroactively on collateral review. ***Teague v. Lane***, 489 U.S. 288 109 S. Ct. 1060, 103 L. Ed 2d 334 (1989).

> More is required. A rule that qualifies under this exception must not only improve accuracy, but also 'alter our understanding of the *bedrock procedural elements*'" essential to the fairness of a *proceeding*.

Sawyer v. Smith, ___ U.S. ___, 110 S.Ct. 2822, 2831 (1990) (quoting ***Teague***, 489 U.S. at 311).

One rule which is repeatedly cited as an example of a rule falling within the second exception is ***Gideon v. Wainwright***, 372 U.S. 335, which held that a defendant has the right to be represented by counsel in all criminal trials for serious offenses. ***Saffle***, 110 S.Ct. at 1264. New rules which lack the "primacy and centrality of the rule adopted in ***Gideon***" do not fall within the second ***Teague*** exception. *See* ***id***.

An example of a new rule which lacked the "primacy and centrality" of ***Gideon*** was the rule adopted in ***Caldwell v. Mississippi***, 472 U.S. 320 (1989). In ***Sawyer v. Smith***, the Supreme Court held that ***Caldwell*** was a new rule under ***Teague*** and did not fit either of the two exceptions. ***Sawyer,*** 110 S.Ct. 2822. ***Caldwell*** held that the Eighth Amendment prohibits the imposition of the death penalty by a sentencer that has been led to believe that the responsibility for determining the appropriateness of the defendant's capital punishment lies elsewhere. ***Caldwell***, 472 U.S. at 328-29. ***Sawyer*** argued that the second ***Teague*** exception "should be read to include new rules of capital sentencing that 'preserve the accuracy and fairness of capital sentencing judgments.'" ***Sawyer***, 110 S.Ct. at 2831. The Supreme Court disagreed because such a test disregarded the additional requirement that the rule must also "alter our understanding of the bedrock procedural elements" essential to the fairness of a proceeding. ***Sawyer***, 110 S.Ct. at 2831. The Court then found that ***Caldwell*** failed to meet this latter requirement.

Sawyer is important because it shows that the rules in ***Mills*** and ***McKoy*** easily meet the first requirement of the second ***Teague*** exception that the new rule be aimed at improving the accuracy of the trial. In ***Sawyer***, the Court stated:

> All of our Eighth Amendment jurisprudence concerning capital sentencing is directed toward the enhancement of reliability and accuracy in some sense.

Sawyer, 110 S. Ct. at 2831. In fact, it was because every Eighth Amendment case concerning capital punishment does meet the first requirement of the second ***Teague*** exception that the Court refused to adopt Sawyer's interpretation of the exception. The Court focused on the fact that ***Caldwell*** did not meet the second requirement, explaining:

> The ***Caldwell*** rule was designed as an enhancement of the accuracy of capital sentencing, a protection of systemic value for state and federal courts charged with reviewing capital proceedings. But given that it was added to an existing guarantee of due process protection against fundamental unfairness, we cannot say this systemic rule enhancing reliability is an "absolute prerequisite to fundamental fairness," 489 U.S. at 314, 109 S.Ct., at 1077, of the type that may come within ***Teague's*** second exception.

Sawyer, 110 S.Ct., at 2832. Because the ***Caldwell*** rule did not meet the "bedrock procedural elements" requirement, the rule did not fall within the second ***Teague*** exception, and Sawyer could not benefit from the new rule. ***Sawyer*** indicates that the rules adopted in ***Mills*** and ***McKoy*** meet the first requirement of the second ***Teague*** exception in that they are aimed at increasing the

accuracy of capital sentencing. *See* ***Sawyer***, 110 S.Ct. at 2831; *see also* ***Woodson v. North Carolina***, 428 U.S. 280, 305 (1976) (noting that because of the difference between a sentence of death and a sentence of life imprisonment, "there is a corresponding need for reliability in the determination that death is the appropriate punishment in a specific case"). What we must decide is whether the ***Mills*** and ***McKoy*** rules meet the second requirement of the second ***Teague*** exception. Justice Harlan explained this second requirement in ***Mackey v. United States***:

> [I]n some situations it might be that time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction.

401 U.S. 667, 693 (1971). The rules in ***Mills*** and ***McKoy*** fit the above description.

"It is well established that the Eighth Amendment draws much of its meaning from 'the evolving standards of decency that mark the progress of a maturing society.'" ***Woodson v. North Carolina***, 428 U.S. 280, 301 (1976) (quoting ***Trop v. Dulles***, 356 U.S. 86, 101 (1958) (plurality opinion)). In addition, the sentence of death is a punishment different in kind, rather than different in degree, from all other sanctions. *See id.* at 303-04; ***Furman v. Georgia***, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring).

The Supreme Court has repeatedly held that the imposition of death requires that the sentencing be individualized. *See* ***Sumner v. Shuman***, 483 U.S. 66, 75 (1987); ***Woodson***, 428 U.S. at 304. In ***Woodson***, the court stated:

> While the prevailing practice of individualized sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment, *see* ***Trop v. Dulles***, 356 U.S. at 100 (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

428 U.S. at 304. *See also* ***Saffle***, *supra*, 110 S.Ct. at 1270 (Brennan, J., dissenting) ("The right to an individualized sentencing determination is perhaps the most fundamental right recognized at the capital sentencing hearing.").

In ***Sumner v. Shuman***, 483 U.S. 66 (1987), the Court traced the history of capital punishment cases. There, the Court explained that the "constitutional mandate of individualized determinations in capital-sentencing proceedings" caused the court to invalidate death sentences where the sentencer did not consider mitigating factors. ***Id***. at 75-76. The Court explained that the Eighth Amendment requires that mitigating evidence be presented to the sentencer and further requires the sentencer to listen to that evidence. ***Id***. at 76.

The discussions in ***Woodson*** and ***Sumner*** support the view that a rule striking down a unanimity requirement for mitigating circumstances is "implicit in the concept of ordered liberty," ***Teague***, 489 U.S. at 307 (quoting ***Palko v. Connecticut***, 302 U.S. 319, 325 (1937) (Cardozo, J.)). The language of ***Mills*** further enforces this view.

In ***Mills***, the Court addressed the possibility that under Maryland's sentencing scheme, one holdout juror could prevent the other eleven jurors from considering mitigating evidence. ***Mills***, 486 U.S. at 374. The Court rejected this scheme as arbitrary:

> Although jury discretion must be guided appropriately by objective standards, it would certainly be *the height of arbitrariness* to allow or require the imposition of the death penalty under the circumstances [where one holdout juror prevents the consideration of mitigating evidence].

Id. at 374 (emphasis added) (citations omitted).

In ***McKoy***, Justice Kennedy further explored the arbitrariness of the unanimity requirement. He stated that the application of the death penalty on the basis of a single juror's vote

> ...represents imposition of capital punishment through a system that can be described as arbitrary or capricious. The Court in ***Mills*** described such a result as the "height of arbitrariness." Given this description, it is apparent that the result in ***Mills*** fits within our line of cases forbidding the imposition of capital punishment on the basis of "caprice," in "an arbitrary and unpredictable fashion," or through "arbitrary" or "freakish" means.

McKoy, 110 S.Ct. at 1239 (Kennedy, J., concurring) (citations omitted).

We find that the rules set out in ***Mills*** and ***McKoy*** are "bedrock procedural elements" and are "implicit in ordered

liberty." The procedures they struck down have been described as "arbitrary" and "capricious." Those procedures did not provide for the "fundamental respect for humanity underlying the Eighth Amendment." ***Woodson***, 428 U.S. at 304. Given the history of the Eighth Amendment jurisprudence and the constitutional requirement of individualized sentences, we believe that a rule striking down an arbitrary unanimity requirement has the same "primacy and centrality" of ***Gideon***. Therefore, we hold that the ***Mills*** and ***McKoy*** rules fall within the second ***Teague*** exception and should be applied retroactively. Applying ***Mills*** and ***McKoy*** to Williams' case, we find that the jury instructions in this case were constitutionally defective. At sentencing, the court required the jury to unanimously find the existence of mitigating circumstances.[4] This unanimity requirement was identical to the unanimity requirement struck down as unconstitutional by the Supreme Court in ***McKoy***. *See* ***McKoy***, 110 S.Ct. at 130. *Cf.* ***Maynard***, *supra*, slip op. at 22. Therefore, under ***McKoy***, the jury instructions in this case were unconstitutional. As a result, we must vacate the sentence of death imposed upon Williams as unconstitutional due to the defective instructions. Accordingly, we vacate Williams' sentence and remand this case to the district court.

IV

There is, in our view, another reason for vacating Williams' sentence which is independent of the reason set forth in part III. This case also presents the question of whether a

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4 The court asked: "Do you *unanimously find* that one or more of the following mitigating circumstances existed at the time of the murder?"

state's failure to raise ***Teague*** in the court below waives it as a defense. Our reading of the Court's statements on the role of ***Teague***, our consideration of the holdings of our sister circuits, and our recent decision in ***Maynard v. Dixon***, 943 F.2d 407 (4th Cir. 1991), lead us to conclude that **Teague**'s retroactivity analysis is not jurisdictional in nature and is an affirmative defense that must be asserted below or else be waived.

The State, seizing on language from ***Penry***, contends that this court must determine "as a threshold matter," 492 U.S. 313, whether Williams' claim for application of ***Mills/McKoy*** is barred by the prohibition against retroactive application of "new rules." In ***Teague*** the Court did state that a habeas court must consider the retroactivity component, i.e., Is a "new rule" being invoked?, before assessing whether the facts of a case meet the rule. However, subsequent cases have shown that this is a matter of logic and not of jurisprudence. Which is to say that if the question is properly presented to a court, then a court should consider first whether a rule can be applied retroactively before deciding whether the case under review meets the rule. That this formulation was not of jurisprudential consequence was made clear by Chief Justice Rehnquist in ***Collins v. Youngblood***: "Although the ***Teague*** rule is grounded in important considerations of federal-state relations, we think it is not 'jurisdictional' in the sense that this Court, despite a limited grant of certiorari, must raise and decide the issue *sua sponte*." ___ U.S. ___, 110 S.Ct. 2715, 2718 (1990) (emphasis in original).

In this case, the chronology of the chain of events is very important. The ***Mills*** decision was handed down on June 6, 1988.

Mills, 486 U.S. 367. Thereafter the district court entered its order denying Williams' habeas relief on September 13, 1988.[5] (JA Vol I, Tab E.) ***Teague*** was decided five months later on February 22, 1989. ***Teague***, 489 U.S. 288. The first oral argument before this court on appeal was heard on November 2, 1989. The ***McKoy*** decision was decided four months later on March 12, 1990. Despite the fact that Williams raised the ***Mills*** issue before the district court, the State admittedly did not raise the retroactivity issue until after the ***McKoy*** decision was rendered.[6] At that time and well after the first oral argument had been held before this court, the State cited this court to additional authority pursuant to Fed. R. App. P. 28(j) and raised the retroactivity issue for the first time. Because of the State's failure to raise the issue until after the district court's decision and this court's first hearing on this appeal, we are confronted with the question of whether the State's failure amounts to a waiver of the issue.

In ***Hanrahan v. Green***, the Seventh Circuit held that the court need not go into the "new rule" analysis because the State did not preserve an objection to the "retroactive application" of the rule at issue. 896 F.2d at 245. Judge Easterbrook noted that the Court had raised the retroactivity question on its own in ***Teague***, but observed that the Court had the practice of applying

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5 In that order, the district court addressed the merits of the ***Mills*** claim raised by Dixon and held that the jury instructions did not violate the ***Mills*** rule (JA Vol I, Tab E, at 30-36.)

6 In its supplemental brief, the State explained: "The State's assertion of non-retroactivity in this case, while admittedly not made in the District Court, is based upon and dictated by the 'novel threshold test for federal review of state criminal convictions' announced in ***Teague***." (Supplemental Brief for Appellee at 36).

a novel constitutional rule to the case establishing the rule. More powerfully, he concluded that the State "had missed the boat" by failing to raise the retroactivity issue. ***Id.***

The Seventh Circuit was not swayed by the State's argument that ***Teague*** had not yet been decided at the time the parties were arguing about the impact of the rule set out in ***Cruz v. NewYork***, 481 U.S. 186 (1987):

> [T]he state did not preserve an objection to the retroactive application of ***Cruz***. After ***Cruz*** came down, the district judge called for briefs on its effects. The state tackled the merits without suggesting that ***Cruz*** should not be applied to [the defendant's] case.. Although it filed this response before the Court decided ***Teague***, that is neither explanation nor excuse.
>
> Disputes about the retroactive application of constitutional decisions have pervaded criminal procedure over the last 25 years. ***Teague*** adopted the position Justice Harlan expoused in ***Mackey v. United States***, 401 U.S. 667, 675, 91 S.Ct. 1160, 1164, 28 L.Ed.2d 404 (1971) (dissenting opinion), which in recent years had gathered the support of a majority of the Justices - though never before Teague in the same case on a collateral attack. (***Griffith v. Kentucky***, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), adopted Justice Harlan's position for cases on direct appeal.) Prosecutors had been pumping for Justice Harlan's position for years. Not phrasing an objection to retroactivity in the precise terms the Court adopted in ***Teague*** is one thing; not phrasing any objection to retroactivity is another.

Hanrahan, 896 F.2d at 245 (emphasis in original). The Seventh Circuit held that the State's failure to raise the retroactivity issue constituted a waiver of the issue. ***Id***.

Other circuits have gone the other way. In ***Hopkinson v. Shillinger***, 888 F.2d 1286 (10th Cir. 1989) (en banc), the Tenth Circuit held that "the non-retroactivity defense is not waived, and should be considered." ***Id***. at 1288. In reaching this conclusion the court noted that "the non-retroactivity defense...was not previously available to the state" because ***Teague*** was decided after the district court entered judgment. For that reason, and because the court saw the scope of the writ of habeas corpus as implicated, the court held that it must raise "the non-retroactivity defense'" *sua sponte*. ***Id***. Similarly, in ***Smith v. Black***, 904 F.2d 950, 981 n. 12 (5th Cir. 1990), a panel for the Fifth Circuit found that though the circuits have split, "the better choice is to reach the ***Teague*** issue" whenever it is raised by the State.

The crux of the cases holding that retroactivity analysis cannot be waived is that courts must be able to take up the issue *sua sponte* because, after all, that is what the Supreme Court itself did in ***Teague***, *See* ***id***.; ***Hopkinson***, 888 F.2d at 1288. We are unpersuaded by this reasoning. As Judge Easterbrook points out in ***Hanranhan***, "there had been a practice of applying a novel constitutional rule to the case establishing the rule and asking the retroactivity question later. ***Teague*** changed that practice....[Thus,] it is understandable that the state did not object to the application of the rule to Teague himself, although the state had objected to the retroactive application to ***Teague*** *of* ***Batson v. Kentucky***, 476 U.S. 79 (1986)." 896 F.2d at 245. Moreover, since ***Teague*** does not represent a change in practice by the Court, it cannot seriously be contended that the Court's reaching the question in ***Teague*** means that all courts must reach the same question-that view denies the role the Court plays in our system.

And this view of retroactivity analysis is confirmed by the Court's holding in ***Collins v. Youngblood***, in which it declared that the ***Teague*** rule "is not 'jurisdictional.'"

Since the ***Teague*** rule is not jurisdictional, in the sense that a court must address it *sua sponte* if not raised, *see* ***Collins***, 110 S.Ct. at 2718, then we confront the question whether a state's failure to raise it below amounts to waiver.

We begin with the general rule that claims not adjudicated below, and in particular defenses that have not been raised in a pleading, by motion, or at trial, normally will be considered waived and cannot be heard for the first time on appeal. ***National Treasury Employees Union v. Internal Revenue Serv.***, 765 F.2d 1174, 1176 n. 1 (D.C. Cir. 1985). In the habeas context, where we proceed on collateral review, the notion of waiver applies, though it typically takes the form of the procedural default rule. Under that rule, when "the claim has not been presented to the state court...it is now barred" unless the petitioner can show cause for the default and actual prejudice. ***Bassette v. Thompson***, 915 F.2d 932, 937 (4th Cir. 1990). We follow that rule vigorously, Justice O'Connor explained in ***Teague***, and "have declined to make the application of the [rule] dependent on the magnitude of the constitutional claim at issue, or on the State's interest in the enforcement of its procedural rule." 489 U.S. at 308 (citations omitted).

The reason for our close adherence to the rule is that "the underlying considerations of finality," which Justice O'Connor saw underpinning the finality of civil judgments, "find significant and compelling parallels in the criminal context." ***Id.*** at 309. We agree. *See* ***Bassette***, 915 F.2d at 935-37. However, finality, and its companion, waiver, must run along a two-way street. Finality certainly means that a petitioner cannot raise new claims on

appeal not yet raised. It also must mean that the State cannot raise new defenses on appeal not raised below.

In ***Maynard v. Dixon***, 943 F.2d 407, 418 (4th Cir. 1991), this court reached the merits of the petitioner's ***Mills/McKoy*** claim because it assumed without deciding that the State had waived the ***Teague*** defense. We agree with the Maynard court and the Seventh Circuit that a state's failure to raise the issue of retroactivity below constitutes waiver of that defense.

In this case, Williams raised the ***Mills*** issue before the district court, and the court rejected his claims on their merits. The State did not raise the retroactivity question in this case at the district court level, although retroactivity claims have been made for the last 25 years. *See* ***Hanrahan***, 896 F.2d at 245. Even after ***Teague*** was decided, the State did not raise the retroactivity issue in its first arguments before this court. It was not until the decision was handed down in ***McKoy*** that the State decided to raise the retroactivity issue. We believe that was too late. On the facts before us, the State "missed the boat," ***Hanranhan***, 896 F.2d at 245, and waived any ***Teague*** defense to the application of ***McKoy*** and ***Mills*** in this case.

V

To summarize, we do not disturb Williams' conviction as the trial court made no constitutional errors concerning the guilt phase of the trial. However, we vacate Williams' sentence of death and remand the case for resentencing because the jury instructions were unconstitutional under the rules set out in ***Mills*** and ***McKoy***. Williams may benefit from the ***Mills*** and ***McKoy*** rules because they are bedrock procedural rules falling within the second exception to the ***Teague*** rule. As an independent and alternative ground, we vacate Williams' sentence and remand for resentencing because the State waived any ***Teague*** defenses to

the retroactive application of these rules by its failure to raise the issue at the district court level or at the first hearing before this court.

In light of our holding on the ***McKoy*** issue, at this time we need not address Williams' assignments of error concerning post-trial proceedings.

AFFIRMED IN PART; VACATED AND REMANDED IN PART

WIDENER, Circuit Judge, concurring:

I concur in the result and in all of the opinion except Part IV. I would hold that the State did not waive the ***Teague*** question as a defense.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED April 17, 1992

No. 89-4001

DOUGLAS WILLIAMS, JR.
Petitioner - Appellant

v.

GARY T. DIXON, Warden; ATTORNEY GENERAL OF NORTH CAROLINA
Respondents - Appellees

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellees filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Chief Judge Ervin, with the concurrence of Judge Widener and Judge Butzner.

For the Court,

/s/ John M. Greacen
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED April 23, 1992

No. 89-4001

DOUGLAS WILLIAMS, JR.
Petitioner - Appellant

v.

GARY T. DIXON, Warden; ATTORNEY GENERAL OF NORTH CAROLINA
Respondents - Appellees

ORDER

Respondents have filed a motion to stay the mandate.

The Court grants the motion and stays issuance of the mandate pending a petition for certiorari to the U.S. Supreme Court.

Entered at the direction of Chief Judge Ervin, with the concurrences of Judge Widener and Judge Butzner.

For the Court,

S/Bert M. Montague
ACTING CLERK

JUDGE FOUNTAIN'S CHARGE TO THE JURY ON THE SENTENCING PHASE OF THE CASE

Ladies and gentlemen, I will in a few moments submit to you for your determination certain issues which bear upon the question of what punishment should be imposed upon the defendant Douglas Williams, Jr. upon his conviction of murder in the first degree.

The relevant portions of the statute, that is, the legislative act under which this proceeding is conducted, provides among other things that in the proceeding, that is, in the sentencing hearing there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case but all such evidence is competent, that is, all such evidence as you have already heard in the guilt phase of the case is competent for your consideration in passing upon punishment.

Also the statute provides that evidence may be presented as to any matter that the Court deems relevant to sentence and may include matters relating to any of the aggravating or mitigating circumstances.

Further, the statute provides that after hearing the evidence, arguments of counsel, and instructions of the Court, the jury shall deliberate and render a sentence recommendation to the Court, based upon the following matters:

Number one: Whether any sufficient aggravating circumstance exists.

Number two: Whether any sufficient mitigating circumstance exists.

Then, based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the state's prison for life.

The sentence recommendation must be agreed upon by unanimous vote of the twelve jurors. I will submit to you certain issues relating to aggravating circumstances and relating to mitigating circumstances. It is for you to say whether any of them exist and, if so, which ones.

I will first read the issues to you and explain them in the order that they are listed.

Number one. Do you unanimously find from the evidence and beyond a reasonable doubt that one or more of the following aggravating circumstances existed at the time of the commission of the murder?

(A) Was the murder committed while the defendant was engaged in the commission of first degree burglary?

(B) Was the murder committed while the defendant was engaged in a sex act?

(C) Was the murder committed for pecuniary gain?

(D) Was the murder especially heinous, atrocious or cruel?

The second issue: Do you unanimously find that one or more of the following mitigating circumstances existed at the time of the murder?

(A) Does the defendant have a significant history of prior criminal activity?

(B) Was the defendant under the influence of mental or emotional disturbance at the time of the murder?

(C) Was the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law impaired?

(D) The age of the defendant at the time of the murder?

(E) Do you find any other circumstances arising from the evidence which the jury deems to have mitigating value?

The third question: Do you unanimously find from the evidence and beyond a reasonable doubt that the aggravating circumstances are sufficient to outweigh the mitigating circumstances?

And four: Do you unanimously find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?

Then there is a place and a date for the signature of foreman of the jury.

Below that reads as follows: We, the jury, based upon the answers to the above issues, and as evidenced by the signature of the undersigned foreman, unanimously recommend to the Court that the punishment of the defendant, Douglas Williams, Jr. be - and there is a blank space. Depending upon how you find, the foreman would write in that space either "death" or "life in prison."

Members of the jury, I referred a few moments ago to aggravating circumstances.

"Aggravate" means to make something worse. A mitigating circumstance is a circumstance which moderates or causes the matter under inquiry to become milder.

Now, as to the first issue, if you find from the evidence and beyond a reasonable doubt that one or more of the following aggravating circumstances existed at the time of the commission of first degree burglary. I am aware that you have determined by your verdict at the first phase of the trial that the defendant committed murder in the commission of first degree burglary and in the commission of a sex act. However, as to this aspect of the case, it is necessary that I resubmit that to you.

Unless requested to do so, I will not go into as much detail as I did at the first phase of the trial when I charged you this morning on the question of guilt or issue or that question, innocence. However, as to that issue or that question, as I said, first degree burglary is the breaking and entering the dwelling of another, which is occupied, and in the nighttime, with the intent to commit a felony therein. And the question for determination here is whether the defendant broke and entered the home of Mrs. Dawson while it was occupied by her, in the nighttime, with the intent to commit larceny therein.

I also said that larceny is the felonious taking and stealing and carrying away personal property of another with the intent on the part of the taker to convert the property to his own use and to permanently deprive the true owner of its use. It is not necessary that larceny should have been committed but it is necessary to constitute first degree burglary that there must have been such an intent at the time of the commission of first degree burglary, if you find that it was committed.

The burden of proof as to that is upon the state to satisfy you beyond a reasonable doubt from the evidence that that aggravating circumstance exists.

Of course, as I have said earlier, the defendant contends he had no such intent. That he went there to go to sleep. That he had no intent to commit any crime of any kind, and that he contends you should answer that, "No."

The state contends that you should answer it, "Yes."

If the state has satisfied you from the evidence and beyond a reasonable doubt the existence of that circumstance you would answer it, "Yes." If you have a reasonable doubt as to that you would answer it, "No."

The second question under the first issue, designated "B" - Was the murder committed while the defendant was engaged in a sex act?

A sex act or sexual act does not have reference to vaginal intercourse or sexual intercourse. It means the penetration, however slight, by any object into the genital or anal opening of another person's body and where that is done to another person by force and against the will of such other person, then it becomes a sexual act.

Therefore, if the defendant caused a mop handle to be inserted into the vaginal tract of Mrs. Dawson while in the commission of murder, that would be the commission while engaged in a sex act.

Now, let me say, members of the jury, to say that a murder is committed while engaged in burglary or while engaged in a sex act does not mean that - well, with reference to the sex act, it does not mean that she must have died the instant that a mop handle

was inserted in her, if you find that it was. It would be sufficient if it was part of the transaction or the enterprise in which the defendant was engaged and if in the process of causing her death he did cause a mop handle to be penetrated in the manner referred to, then that would constitute a murder while engaged in a sexual act even though she may not have died at that precise moment.

The burden of proof as to that issue is upon the state to satisfy you from the evidence and beyond a reasonable doubt that the defendant did commit murder of Mrs. Dawson while engaged in a sexual act. I believe the copies of the issues I handed you refers to "sex act." It should be "sexual." When I have said "sex act" I am referring to "sexual act," which is the language used in the statute.

Number (C) Was the murder committed for pecuniary gain?

That simply means did he kill Mrs. Dawson for the purpose of getting something of value from her or from her home that he did not own or have any right or claim to. Or, to put it another way, did he kill her for the purpose of stealing or committing larceny, as I have defined that to mean.

Of course, that is a question of intent, as to what his intent was, if any, and it is for you to say.

He contends if he wanted to have any pecuniary gain he could have done more than maybe getting a set of keys or possibly some blank checks. He contends there were many things of value in that house and if he wanted to steal something of value he had every opportunity to do so and that blank checks and keys had no real market value. So, he contends, members of the jury, you should answer that issue, "No," and the state contends that he did go there for the purpose of stealing. That he had that intent and that the murder was committed for pecuniary gain. However, that

is for you to determine. If the state has satisfied you from the evidence and beyond a reasonable doubt that the murder was committed for pecuniary gain, you will answer that, "Yes." If you have a reasonable doubt as to that, you will answer it, "No."

Now, number (D) - Was the murder especially heinous, atrocious or cruel?

Our Court has said that every murder is not especially heinous, atrocious or cruel. That does not apply to every homicide. By using the word "especially," the legislature indicated that there must be evidence that the brutality involved in the murder in question must exceed that normally present in any killing before the jury could answer that issue in favor of the state.

Further, I instruct you that the words, "especially heinous, atrocious or cruel," means extremely or especially or particularly heinous or atrocious or cruel. You are instructed that "heinous" means extremely wicked or shockingly evil. "Atrocious" means marked by or given to extreme wickedness, brutality or cruelty; marked by extreme violence or savagely fierce. It means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain; utterly indifferent to or enjoyment of the suffering of others.

So, it is for you to determine, members of the jury, whether the murder of Mrs. Dawson meets that test or whether it does not.

The state contends that she suffered a slow and agonizing and brutal death. That her death was especially heinous and cruel and atrocious.

The defendant, on the other hand, contends that she must have been unconscious in a very short while and even if she lingered she was not suffering pain, or that if she did it would have been for a very short while, and that you should answer that, "No."

However, that is for you to determine and as to that, if the state has satisfied you from the evidence and beyond a reasonable doubt that the murder was especially heinous, atrocious or cruel, you would answer that, "Yes." If you have a reasonable doubt as to that, you would answer it, "No."

After considering issue number one and the subsections (A), (B), (C) and (D), you will consider issue number two which reads: "Do you unanimously find that one or more of the following mitigating circumstances existed at the time of the murder?"

Now, members of the jury, the burden as to that issue and the subsections is upon the defendant, but he does not have the burden of satisfying you beyond a reasonable doubt as to the existence of any mitigating circumstance. He has the duty merely to satisfy you from the evidence in the case, and "(A)" under that section reads: "Does the defendant have a significant history of prior criminal activity?" Of course, if he does not that is a mitigating circumstance.

The defendant contends that his criminal record has been offered and that it consists of simple offenses, offenses of little consequence. He contends that even though there has been offered in evidence certified copies of a record of seven - eight - nine convictions that many of them were he contends when he was much younger. That they were principally simple assaults. That in most instances he was released from jail when he was convicted because he had been in jail a week or two, and that in many of them he was fined only a small fine or court costs or given probation; and that only once has he served an active prison sentence. So, he contends, members of the jury, that there is nothing significant about that.

The word, "significant," as used in this issue means important, momentous; and the question is whether the defendant

has a significant history of criminal activity or whether he does not.

If he has satisfied you, merely satisfied you, that he does not have a significant history of prior criminal activity, then you will answer that, "No," that is to say that he does not. If he has failed to so satisfy you and if you believe that the record which has been offered as to his prior criminal record is a significant history of prior criminal activity, you would answer it, "Yes."

(B) Was the defendant under the influence of mental or emotional disturbance at the time of the murder?

As to that, members of the jury, the burden is upon the defendant to merely satisfy you that he was under the influence of mental or emotional disturbance at the time of the murder?

As to that he contends that it was determined by a state psychiatrist in September of this year that the defendant suffers mild mental retardation, with an I.Q. of 63. That he reads at the grade level of 3.9. He contends that was intoxicated. That his mind was disturbed.

Mental disturbance, of course, has reference to the thinking process and the use of the mind.

The emotional disturbance, if there be one, refers to a person's nerves, to his emotions, and the question here is whether the defendant because of his possible brain disease, his low I.Q., his inability to learn very much, his intoxication which he contends he was experiencing that night; as to whether all of those and he contends all of those combined to influence and did influence the mental and emotional disturbance and cause mental and emotional disturbance at the time of the murder.

The state contends that the defendant was not as drunk - or wasn't drunk and if intoxicated was aware of his surroundings, was aware of what was going on. That he was not emotionally disturbed nor mentally disturbed. That even if he had had pills and intoxicating liquor the state contends that he knew what he was doing and that he did whatever he did do deliberately and not as a result of any emotional or mental disturbance.

However, that is for you to determine and if the defendant has satisfied you, that is, merely satisfied you, that he was under the influence of mental or emotional disturbance at the time of the murder, then you would answer that, "Yes." If he has failed to satisfy you as to that, you would answer it, "No."

One further thing let me say in regard to that particular issue or section of the issue, to say that one is disturbed emotionally means agitation of the passions or sensibilities; strong feelings arising subjectively rather than through conscious mental effort.

So, members of the jury, it is for you to answer that, depending upon how you find from all the evidence in the case.

Number (C) Was the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law impaired?

Let me say to you as to that issue, members of the jury, for a person to be excused for the commission of a crime on the grounds of insanity the person must have suffered such defect of mind or disease of mind as not to know the nature and quality of his act; or if he did know it not to know that it was wrong. To use the language of our Supreme Court, "An accused is legally insane and exempt from criminal responsibility by reason thereof if he commits an act which would otherwise be punishable as a crime and at the time of so doing is laboring under such a defect of reason

from disease of the mind as to be incapable of knowing the nature and quality of the act he is doing or if he does know this incapable of distinguishing between right and wrong in relation to such act."

Now, I explain that to say to you that the issue that we are now discussing does not contemplate and it is not claimed that the defendant was suffering from such a defect of reason as to be able to understand the nature and the quality of his act or to know that he was doing wrong. That is not the question. The question is whether his capacity to appreciate the criminality of his conduct was impaired or his ability to conform his conduct to the requirements of the law was impaired. While the defendant might have known that his conduct was wrong he might not have been able to appreciate, that is, to fully comprehend or be fully sensible of its wrongfulness.

Further, while his capacity to so appreciate the wrongfulness of his conduct might not have been impaired - might not have been totally obliterated, it might have been impaired. That means lessened or diminished and even if there was no impairment of defendant's capacity to appreciate the criminality of his conduct, you could find depending upon how you determine from the evidence and you should consider whether the existence of this mitigating factor existed, and it would if you believe that the defendant's capacity to conform his conduct to the law, that is, his capacity to refrain from illegal conduct, was impaired.

This does not mean that the defendant must wholly lack all capacity to conform. It means only that such capacity as he might otherwise have had in the absence of his mental defect is lessened or diminished because of the defect.

Now, he contends that he has a mental defect. That he is slightly retarded or mildly retarded is the word used by the psychiatrist. He contends that his capacity to conform his conduct to the requirements of the law was impaired; that it was lessened;

that it was diminished and his ability to appreciate the criminality of his conduct was lessened and diminished, that is, impaired. The state contends that even if he had any defect of reason that his capacity to appreciate the criminality of his conduct was not impaired. The state contends that he knew everything that he did and that his inability [sic] to conform his conduct to the requirements of the law, the state contends, was not impaired.

The defendant, however, contends that he had been drinking heavily and if not drunk was intoxicated and that with the pills he had been taking and the intoxicating liquors he had been drinking all combined to diminish and impair his capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law.

If he has satisfied you, members of the jury, from the evidence in the case that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, then you would answer that issue, "Yes." Otherwise, you would answer it, "No."

On the next page you will find the next subsection or portion of this issue entitled "(D)" The Age of the defendant at the time of the murder? That is listed in the statute under what may be mitigating circumstances is the age of the defendant.

The only evidence I recall about his age is that he was 23 - or is 23 years of age. Whether that is a mitigating factor or whether it isn't is for you to determine.

He contends that he is still a very young man and that is a circumstance that mitigates whatever his conduct may have been.

The state contends that he is old enough to know, that he did know, that he is not an adolescent child, that he is not a

teenager but that he is 23 years of age, and the state contends that is not a mitigating circumstance.

However, if the defendant has satisfied you from the evidence in the case that his age is a mitigating circumstance, you would answer that "Yes." Otherwise, you you would answer it, "No."

Number (E) Do you find any other circumstances arising from the evidence which the jury deems to have mitigating value?

He contends, members of the jury, that you should sift through the evidence. That you should consider all of the reasons that would justify your answering that, "Yes." It is for you to determine from all the evidence in the case whether there is any mitigating circumstance that has not been referred to already and which arises from the evidence. In considering that you should consider all of the things that we have discussed concerning mitigation, that is, his age; the condition he was in that night, whatever you find it to have been; his mental problems, if you find that he has one; his intoxication; his addiction to alcohol; all the circumstances that you deem to be of mitigating value or any of the circumstances you deem to be of mitigating value; and if you find from the evidence any circumstance which you deem to have mitigating value, you would answer that, "Yes." Otherwise, you would answer it, "No."

Then, members of the jury, you should go to the third issue which reads: Do you unanimously find from the evidence and beyond a reasonable doubt that the aggravating circumstances are sufficient to outweigh the mitigating circumstances?

As to that issue, members of the jury, if you have found at least one aggravating circumstance to exist, one or more, you would go to issue number three which reads, "Do you unanimously find from the evidence and beyond a reasonable doubt

that the aggravating circumstances are sufficient to outweigh the mitigating circumstances?"

Now, when you come to consider that question, it is not who has the most favorable answers to the issues and to the questions. It is not a question of numerical weight. The question is the weight of the testimony and the weight of the circumstances you find to exist as to whether those which are aggravating outweigh in your minds the mitigating circumstances. And if you find from the evidence and beyond a reasonable doubt that the aggravating circumstances are sufficient to outweigh, that is, in value and in importance the mitigating circumstances, you would answer that, "Yes." Otherwise, you would answer it, "No."

If you answer the third issue "No," you would not consider the fourth issue, and under those circumstances you would stop there and recommend life in prison, but if you answer that issue "Yes," you will go to the fourth issue which reads: "Do you unanimously find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?"

That is simply a matter for you to determine, members of the jury, based upon your findings concerning the aggravating and mitigating circumstances and if you have answered the third issue "Yes," and if you find beyond a reasonable doubt that the aggravating circumstances which you have found are sufficiently substantial to call for the imposition of the death penalty, you would answer that, "Yes."

If you answer that "Yes," it would be the duty of the jury to recommend death. If you answer that "No," it would be the duty of the jury to recommend life in prison.

You all step up here, please.

(UNRECORDED BENCH CONFERENCE.)

Sheriff, will you pick up those copies of the issues.

(THE SHERIFF DOES SO.)

All right, members of the jury, the twelve of you may retire. The alternates, if you will, wait for us, under the same instructions, in the courtroom, if you like. You might prefer to go out in the audience area to be seated but stay with us, please.

Ladies and gentlemen, when you have completed your findings, let the sheriff know and we will ask you to come in and give us your verdict in this phase of the case.

(THE JURY RETIRED AT APPROXIMATELY 4:25 P. M.)

Let the record show, please, that before the jury retired to make its determination as to punishment the Court and defendant's counsel and the district attorney had a charge conference in the absence of the jury, at which time defendant's counsel requested the Court to instruct the jury if they did not agree on a verdict in a reasonable time they would be discharged and a life sentence imposed. The Court declines to so instruct the jury and the defendant EXCEPTS.

We will just be at ease, ladies and gentlemen.

(AT APPROXIMATELY 5:50 P.M. THE JURY RETURNED TO THE COURTROOM.)

THE COURT: I understand from the sheriff there is some question the jury wishes to ask me, is that correct?

FOREMAN: Yes, sir.

THE COURT: All right.

FOREMAN: We seem to find some ambiguity in the wording of Item Two, the first question in Item Two, and then 2. (B). The question of where the unanimous part comes in . . .

THE COURT: Well . . .

FOREMAN: It seems to be a reversal.

THE COURT: No, no. Question Number Two is asking about mitigating circumstances. If you find either mitigating circumstance to exist - you can't make such a finding unless it is a unanimous finding and, of course, you couldn't make a finding that any aggravating circumstance exists unless it is unanimous. That means unless all of you agree.

FOREMAN: Yes, sir, but the way some of the questions (A) (B), and (C), are listed there in some cases a "Yes" would be a mitigating circumstance . . .

THE COURT: That's right . . .

FOREMAN: And in some cases a "No" would be a mitigating circumstance . . .

THE COURT: That is right.

FOREMAN: And that is what has got us confused. THE COURT: I'm not doing that to confuse you, I am just using the language of the statute. Do you want me to talk to you about Number Two and (A) and (B), are they the ones?

FOREMAN: (B) is the one we are having a problem with.

THE COURT: Well, that question is this: Do you unanimously find . . . Did you say (B)?

FOREMAN: Yes, sir.

THE COURT: . . . that the defendant was under the influence of mental or emotional disturbance at the time of the murder?

That is to say, if he was under the influence of mental or emotional disturbance at the time of the murder, you should answer that, "Yes." If he was not or if you do not find that he was under the influence of mental or emotional disturbance at the time of the murder, you would answer it, "No."

FOREMAN: When you say "find," you mean unanimously find?

THE COURT: Yes, sir. Yes, sir.

FOREMAN: Thank you, sir.

THE COURT: And I point out that Number Two simply asks if you find the existence of one or more of the following mitigating circumstances. As I said, that doesn't require a finding beyond a reasonable doubt but it merely means do you find from the evidence in the case, or are you satisfied from the evidence in the case - that one or more exists and those that you are so satisfied you should answer them that they do exist. Otherwise, you would not.

Is (B) the only one that you . . .

FOREMAN: That seems to be.

THE COURT: All right. Does that answer your question?

FOREMAN: It does me.

THE COURT: All right. Apparently there is no other question. You may retire.

FOREMAN: Thank you.

THE COURT: While you are in here, may I make an inquiry of you?

It is almost 6:00 o'clock. You have been out, I believe, about an hour and a half at this stage of the proceeding. I don't want to try to punish the jury or try to force a verdict or anything of that kind. If you are making progress and want to stay out a while longer, it will be fine. If you don't agree, and I am certainly not trying to rush you but if you don't agree in a short while I will be glad to let you go home and come back in the morning, because I know it can be awful tiring staying up here all day, especially when you aren't used to it.

FOREMAN: I would say let us go a while longer.

THE COURT: All right.

(THE JURY RETIRES FROM THE COURTROOM AT APPROXIMATELY 5:56 P. M.)

(THE COURT SENT FOR THE JURY AT APPROXIMATELY 6:35 P. M.)

THE COURT: The sheriff reports that the jury said if you will give them about two more minutes they will be through.

(THE JURY RETURNED TO THE COURTROOM IN A FEW MINUTES.)

THE COURT: Will you stand, please.

(THE JURY STANDS.)

THE COURT: You have agreed on the issues and verdict concerning the question of punishment, is that correct?

FOREMAN: That's right.

THE COURT: You have found for your verdict - you unanimously find from the evidence and beyond a reasonable doubt that one or more of the following aggravating circumstances existed at the time of the commission of the murder?

(A) Was the murder committed while the defendant was engaged in the commission of first degree burglary? You answer that "Yes?" Is that correct?

FOREMAN: Yes.

THE COURT: (B) Was the murder committed while the defendant was engaged in a sex act? You answer that "Yes?" Is that correct?

FOREMAN: Yes.

THE COURT: (C) Was the murder committed for pecuniary gain? You answer that "Yes?" Is that correct?

FOREMAN: Yes, sir.

THE COURT: (D) Was the murder especially heinous, atrocious or cruel? You answer that "Yes?" Is that correct?

FOREMAN: Yes, sir.

THE COURT: Do each of you agree to that?

JURY: YES.

THE COURT: Number Two. Do you unanimously find that one or more of the following mitigating circumstances existed at the time of the murder?

(A) Does the defendant have a significant history of prior criminal activity? You answer that "Yes?" Is that your verdict as to that?

FOREMAN: Yes.

THE COURT: (B) Was the defendant under the influence of mental or emotional disturbance at the time of the murder? You answer that "No?" Is that your verdict as to that?

FOREMAN: Yes, sir.

THE COURT: (C) Was the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law impaired? You answer that "No?" Is that your verdict as to that?

FOREMAN: Yes.

THE COURT: (D) The age of the defendant at the time of the murder? You answer that "No?" Is that your verdict as to that?

FOREMAN: Yes.

THE COURT: (E) Do you find any other circumstances arising from the evidence which the jury deems to have mitigating value? You answer that "No?" Is that your verdict as to that?

FOREMAN: Yes, sir.

THE COURT: Number Three. Do you unanimously find from the evidence and beyond a reasonable doubt that the aggravating circumstances are sufficient to outweigh the mitigating circumstances? You answer that "Yes?" Is that your verdict as to that?

FOREMAN: Yes, sir.

THE COURT: Number Four. Do you unanimously find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty? You answer that "Yes?"

FOREMAN: Yes, sir.

THE COURT: So say you all?

JURY: YES, SIR.

THE COURT: And that is signed, dated today and signed by Mr. Marks as foreman.

I read further: "We, the jury, based upon the answers to the above issues, and as evidenced by the signature of the undersigned foreman, unanimously recommend to the Court that the punishment of the defendant, Douglas Williams, Jr., be death."

Is that the verdict of each of the jurors?

JURY: YES.

THE COURT: All right, have seats, please. Members of the jury, it will be necessary that I ask each of you individually

concerning your verdict on the question of punishment and, of course, answer, please, as I call your name.

DEBORAH LEWIS PENDER.

MRS. PENDER: Yes.

THE COURT: Mrs. Pender, do you find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?

MRS. PENDER: Yes, Your Honor.

THE COURT: Is that your finding?

MRS. PENDER: Yes.

THE COURT: And do you still assent thereto? Do you still agree to that?

MRS. PENDER: Yes, Your Honor.

THE COURT: MARY B. CARNEY.

MRS. CARNEY: Yes, Your Honor.

THE COURT: Mrs. Carney, do you find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?

MRS. CARNEY: Yes.

THE COURT: Is that your finding?

MRS. CARNEY: That's right.

THE COURT: Do you still assent thereto?

MRS. CARNEY: Yes, Your Honor.

THE COURT: ALTON T. STRICKLAND.

MR. STRICKLAND: Yes, sir.

THE COURT: Mr. Strickland, do you unanimously find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?

MR. STRICKLAND: Yes, sir.

THE COURT: Do you still assent thereto?

MR. STRICKLAND: Yes.

THE COURT: Let me go back, first as to Mrs. PENDER, based upon your finding, do you recommend that the punishment of the defendant Douglas Williams, Jr. be death?

MRS. PENDER: Yes, Your Honor.

THE COURT: Do you still assent thereto?

MRS. PENDER: Yes, Your Honor.

THE COURT: MRS. CARNEY, I failed to ask you, I think - do you based upon what you have just said recommend to the Court that the punishment of the defendant Douglas Williams, Jr. be death?

MRS. CARNEY: Yes, Your Honor.

THE COURT: Do you still assent to that too?

CARNEY: Yes.

THE COURT: MR. STRICKLAND, do you based upon your finding recommend to the Court that the punishment of the defendant Douglas Williams, Jr. be death?

MR. STRICKLAND: Yes, Your Honor.

THE COURT: Do you still assent to that?

MR. STRICKLAND: Yes.

THE COURT: MR. PETER TAPIA.

MR. TAPIA: Yes.

THE COURT: Mr. Tapia, do you find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?

MR. TAPIA: Yes.

THE COURT: Based thereon do you recommend to the Court that the punishment of the defendant Douglas Williams, Jr. be death? MR. TAPIA: Yes.

THE COURT: Do you still assent thereto?

MR. TAPIA: Yes.

THE COURT: MR. JAMES MACK.

MR. MACK: Yes, sir.

THE COURT: Mr. Mack, do you find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?

MR. MACK: Yes, sir.

THE COURT: Based thereon do you recommend to the Court that the punishment of the defendant Douglas Williams, Jr. be death?

MR. MACK: Yes.

THE COURT: Is that your verdict?

MR. MACK: Yes, sir.

THE COURT: Do you still assent thereto?

MR. MACK: Yes.

THE COURT: Mr. Marks, do you find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?

MR. MARKS: Yes, sir.

THE COURT: Based thereon do you recommend to the Court that the punishment of the defendant Douglas Williams, Jr. be death?

MR. MARKS: Yes.

THE COURT: Do you still assent thereto?

MR. MARKS: Yes.

THE COURT: MR. JAMES JOYNER.

MR. JOYNER: Yes.

THE COURT: Mr. Joyner, you have found from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?

MR. JOYNER: Yes.

THE COURT: And based thereon do you recommend to the Court that the punishment of the defendant Douglas Williams, Jr. be death?

MR. JOYNER: Yes, sir.

THE COURT: Do you still assent thereto?

MR. JOYNER: Yes, sir.

THE COURT: MR. WILLIAM J. LYNCH.

MR. LYNCH: Yes.

THE COURT: Mr. Lynch, do you find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?

MR. LYNCH: Yes, Your Honor.

THE COURT: And based thereon do you recommend to the Court that the punishment of the defendant Douglas Williams, Jr. be death?

MR. LYNCH: Yes, Your Honor.

THE COURT: And do you still assent thereto?

MR. LYNCH: Yes, I do.

THE COURT: MR. JAMES NORRIS. MR. NORRIS: Yes, sir.

THE COURT: Mr. Norris, do you find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?

MR. NORRIS: Yes.

THE COURT: Based thereon do you recommend to the Court that the punishment of the defendant Douglas Williams, Jr. be death?

MR. NORRIS: Yes.

THE COURT: Do you still assent thereto?

MR. NORRIS: Yes.

THE COURT: MR. CHARLIE W. LEWIS.

MR. LEWIS: Yes, sir.

THE COURT: Mr. Lewis, do you find from the evidence and beyond a reasonable doubt that the aggravating circumstances

found by you are sufficiently substantial to call for the imposition of the death penalty?

MR. LEWIS: Yes, sir.

THE COURT: And based thereon do you recommend to the Court that the punishment of the defendant Douglas Williams, Jr. be death?

MR. LEWIS: Yes, sir.

THE COURT: Do you still assent thereto?

MR. LEWIS: Yes.

THE COURT: MR. ERNEST PROCTOR.

MR. PROCTOR: Yes.

THE COURT: Mr. Proctor, do you find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?

MR. PROCTOR: Yes.

THE COURT: And based thereon do you recommend to the Court that the punishment of the defendant Douglas Williams, Jr. be death?

MR. PROCTOR: Yes.

THE COURT: MR. PERRY WADSWORTH.

MR. WADSWORTH: Yes, sir.

THE COURT: Mr. Wadsworth, do you find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?

MR. WADSWORTH: Yes, Your Honor.

THE COURT: And based thereon do you recommend to the Court that the punishment of the defendant Douglas Williams, Jr. be death?

MR. WADSWORTH: Yes, Your Honor.

THE COURT: And do you still assent thereto?

MR. WADSWORTH: Yes.

THE COURT: Do each of the jurors assent to the finding and the recommendation that has been announced?

JURY: YES, WE DO.

THE COURT: DOUGLAS, STAND UP.

MR. BRIDGERS: I would like to make a motion.

THE COURT: You can put the motions you want in the record.

DOUGLAS, is there anything you want to say as to why judgment of death should not be pronounced against you?

DOUGLAS WILLIAMS, JR.: NO.

THE COURT: The defendant, Douglas Williams, Jr. was duly indicted by the Grand Jury of Edgecombe County on a bill

of indictment charging murder in the first degree of Adah H. Dawson.

The defendant was thereafter arraigned and entered a plea of not guilty. The defendant was brought to trial on November 16, 1981 upon the charge set out in the aforesaid bill of indictment. A jury was duly impanelled and, after hearing all the evidence, arguments of counsel and charge of the Court, returned with their verdict and found the defendant guilty of murder in the first degree.

Thereafter on November 20, 1981, before the same jury, evidence was offered concerning punishment. Thereafter, counsel for the state and counsel for the defendant argued to the jury and the jury was charged upon the issues concerning aggravating and mitigating circumstances and further found from the evidence and beyond a reasonable doubt that the aggravating circumstances found are sufficiently substantial to call for the imposition of the death penalty.

WHEREUPON, the jury unanimously recommended to the Court that the punishment for Douglas Williams, Jr. be death.

It is, therefore, CONSIDERED, ORDERED AND ADJUDGED that the defendant be transported to the State Prison in Raleigh by the Sheriff of Edgecombe County and that he shall remain in the custody of the Warden of State Prison until Friday, March 26, 1982, and that on said day between the hours of ten o'clock in the morning and three o'clock in the afternoon the defendant shall be taken by said Warden or his duly authorized Deputy to the place provided for execution in said penitentiary.

It is further ADJUDGED that the Warden or his duly authorized Deputy shall then and there take the defendant into the death chamber where the defendant shall be caused to suffer death

by inhaling lethal gas, and lethal gas shall be continued to be administered of sufficient quantity to cause death.

AND MAY GOD HAVE MERCY ON YOUR SOUL.

(THE JURORS WERE DISMISSED WITH THE THANKS OF THE COURT.)

THE COURT: (To Mr. Bridgers) Do you want to put your motions in the record? Let the record show they were made upon the coming in of the verdict.

MR. BRIDGERS: THE DEFENDANT MOVES TO SET THE VERDICT ASIDE AS BEING AGAINST THE GREATER WEIGHT OF THE EVIDENCE.

THE COURT: DENIED.

MR. BRIDGERS: THE DEFENDANT MOVES FOR A NEW TRIAL FOR ERRORS COMMITTED DURING THE COURSE OF THE TRIAL ASSIGNED AND TO BE ASSIGNED.

THE COURT: DENIED.

MR. BRIDGERS: THE DEFENDANT MOVES FOR APPROPRIATE RELIEF.

THE COURT: DENIED.

MR. BRIDGERS: THE DEFENDANT GIVES NOTICE OF APPEAL.

THE COURT: Upon the coming in of the verdict of guilty and the judgment of death the defendant in open Court through counsel OBJECTS and EXCEPTS and gives notice of appeal to

the Supreme Court. Further notice is waived. The defendant will be allowed 90 days in which to state and serve record on appeal and the state will be allowed 30 days thereafter to serve counter-record or exceptions. No appearance bond is allowed.